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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 486.

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, PLAINTIFF IN ERROR,

vs.

A. P. BOND, ADMINISTRATOR OF THE ESTATE OF  
WILLIAM L. TURNER, DECEASED.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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FILED JUNE 7, 1915.

(24,760)





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*a* In the Supreme Court of the United States.

No. —.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a  
Corporation. Appellant,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Appellee.

On Writ of Error to the Supreme Court of Oklahoma.

C. O. Blake, R. J. Roberts, W. H. Moore, J. G. Gamble and  
K. W. Shartel, of El Reno, Oklahoma, Attorneys for Appellant.  
John C. Moore, of Enid, Oklahoma, Attorney for Appellee.

*b* Return to Writ.

In obedience to the commands of the within Writ of Error, I herewith transmit a duly certified transcript of the record and all proceedings in the within entitled cause, to the Supreme Court of the United States.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court of Oklahoma, at Oklahoma City, Oklahoma, this 21st day of May, 1915.

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,

*Clerk Supreme Court, State of Oklahoma.*

*1* Filed May 8, 1915. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to A. P. Bond, Administrator of the Estate of Wm. L. Turner, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein The Chicago, Rock Island & Pacific Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, Mathew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this 8th day of May, A. D., 1915.

MATTHEW J. KANE,  
*Chief Justice of the State of Oklahoma.*

[Seal of the Supreme Court, State of Oklahoma.]

Attest:

WM. M. FRANKLIN,  
*Clerk of the Supreme Court of  
the State of Oklahoma.*

2 Filed May 8, 1915. William M. Franklin, Clerk.

STATE OF OKLAHOMA,  
*Garfield County:*

I, the undersigned attorney of record for the defendant in error in the above cause, hereby acknowledge due service of the above citation and enter an appearance for said defendant in error in the Supreme Court of the United States. This May 8, 1915.

JOHN C. MOORE,  
*Attorney for A. P. Bond, Administrator  
of the Estate of Wm L. Turner, Deceased.*

3 Filed May 8, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6528.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Defendant in Error.

*Petition for Allowance of a Writ of Error from the Supreme Court  
of the United States.*

To Mathew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa and having its principal place of business in the City of Chicago in said state of Illinois, plaintiff in error in the above entitled cause, respectfully shows to the court that on the 13th day of April, 1915, the Supreme Court of the State of Oklahoma rendered a decision in the above entitled cause, then pending on appeal therein, by which decision the judgment of the



District Court of Garfield County, Oklahoma, rendered in said cause was affirmed, and that the said Supreme Court of the State of Oklahoma is the highest court of said state in which a decision of this action could be had.

That in said action there was drawn in question a right arising under a statute of the United States, and the decision of this cause in both the trial court and in this court is against and denies such right, the said statute of the United States being an act of the

4 Congress of the United States entitled "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, (35 Statutes at Large 65) as amended April 5, 1910, (36 Statutes at Large 291) and petitioner avers that the said statute, at the time of the institution of this action, and of the decision of the said Supreme Court of the State of Oklahoma, had not expired by its own limitation, and was not altered or repealed by law.

Your petitioner further represents and shows to the court that in said action there was drawn in question a right, privilege or immunity claimed under a statute of the United States, and the decision of this cause in both the trial court and in this court is against and denies to your petitioner such right, privilege or immunity, the said statute of the United States entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large 65), as amended April 5, 1910 (36 Statutes at Large 291).

Your petitioner further represents and shows to the court that there was drawn in question a right arising under a statute of the United States, and the decision of this cause in both the trial court and in this court is against and denies to your petitioner such right, the said statute of the United States being an act of Congress of the United States entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893 (27 Statutes at Large 531) as amended March 2, 1903, (32 Statutes at Large 943), and petitioner avers that said statute at the time of the institution of this action and of said decision of the Supreme Court of Oklahoma had not expired by its own limitation and was not repealed by law.

5 Your petitioner further represents and shows to the court that in said action there was drawn in question a right, privilege or immunity claimed under a statute of the United States, and the decision of this cause in both the trial court and in this court is against and denies to your petitioner such right, privilege or immunity, the said statute of the United States being an act of Congress of the United States entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by compelling Common Carriers engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893, (27

Statutes at Large 531), as amended March 2, 1903, (32 Statutes at Large 943).

Your petitioner further represents and shows to the court that the judgment and decision of this court were erroneous in sustaining the judgment of the trial court, and in holding that the facts adduced at the trial of this cause, which appear from the record in this court, were sufficient to sustain the cause of action in favor of the plaintiff and against the defendant in said trial court, and in denying to the defendant in said trial court the defense of the contributory negligence of plaintiff's intestate in that the jury was erroneously instructed in respect thereto.

Your petitioner further represents and shows to the court that the cause of action of the plaintiff (defendant in error here) and against the defendant (plaintiff in error here) for and on account of the death of the said W. L. Turner is, by the expressed terms of the petition of the plaintiff, predicated upon, pursuant to and by virtue of the aforesaid acts of the Congress of the United States, and that in the administration of those acts in this cause the trial court and this court, by its decision, have committed error.

Petitioner therefore desires to avail itself of the law and practice in such case made and provided by writ of error from the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to this court: for such other and further process as will enable your petitioner to obtain a review of the case, and a correction of the said error by the said Supreme Court of the United States, and also that an order be made fixing the amount of security which said plaintiff in error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner will ever pray, etc.

C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE, &  
K. W. SHARTEL,

*Attorneys for the Chicago, Rock Island &  
Pacific Railway Company, Plaintiff in Error.*

7 Filed May 8, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner, Defendant in Error.

*Assignment of Errors.*

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the substantial rights of the plaintiff in error, in the following particulars, to-wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment rendered in said cause by the District Court of Garfield County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in holding that the facts adduced at the trial of said cause and appearing in the record of said cause in said court were sufficient to constitute negligence on the part of this plaintiff in error (defendant below) and to sustain the cause of action in favor of the defendant in error (plaintiff below) and against this plaintiff in error (defendant below).

3. That the Supreme Court of the State of Oklahoma erred in affirming the action of the District Court of Garfield County, Oklahoma, in giving to the jury paragraphs 10, 16, 17 and-18  
8 of the instructions given to the jury, whereby the defense of contributory negligence of the said William L. Turner, for and on account of whose death this action was instituted, to the extent and in the manner prescribed by the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, (35 Statutes at Large 65), as amended April 5, 1910, (36 Statutes at Large 291) was denied to this plaintiff in error (defendant below).

4. That the Supreme Court of the State of Oklahoma erred in holding that the said William L. Turner was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad, while engaging in commerce between several states, suffering an injury while he was employed by such carrier in such commerce.

5. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its refusal to hold that the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an independent contractor, and

therefore not subject to the terms of the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, (35 Statutes at Large 65), as amended April 5, 1910, (36 Statutes at Large 291).

6. That the Supreme Court of the State of Oklahoma erred in its affirmance of the action of the District Court of Garfield County, Oklahoma, whereby there was admitted incompetence evidence, bearing upon the question whether the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad engaged in interstate commerce, and as such himself engaged in interstate commerce.

7. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its construction of the duties imposed by the act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by compelling Common Carriers engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893, (27 Statutes at Large 531), as amended March 2, 1903, (32 Statutes at Large 943), and said Supreme Court of the State of Oklahoma further erred in its affirmance of the action of the District Court of Garfield County, Oklahoma, in giving to the jury in said cause paragraphs 10, 16, 17 and 18 of the instructions given to the jury, whereby this defendant (plaintiff in error here) was denied the defence of the contributory negligence of the said William L. Turner, for and on account of whose death this action was instituted, to the extent and in the manner prescribed by the act of Congress, entitled: "An act relating to liability of common carriers by railroads to their employees in certain cases," approved April 22, 1908, (35 Statutes at Large 65), as amended April 5, 1910, (36 Statutes at Large 291).

8. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that the said District Court of Garfield County, Oklahoma, by paragraph 11 of the instructions given to the jury, erroneously defined the negligence of this plaintiff in error, for and on account of which a recovery might be had, and wholly failed to properly instruct the jury thereupon.

9. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that, by paragraphs 22, 23 and 24 of the instructions given to the jury, they were authorized to consider, in arriving at their judgment, matters and things not in evidence.

10. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that paragraph 20 of the instructions given to the jury, submitted as an issue in the case, whether or not there had been a purpose or intent to evade the liability under the Federal Employers' Liability Act (35 Statutes at Large 65) in the

execution of the contract between the said William L. Turner and this plaintiff in error, since there was no evidence in the record showing such purpose or intention.

11. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that, by paragraph 21 of the instructions given to the jury, the said court attempted to define what facts constitute interstate commerce, and thereby invaded the province of the jury.

12. That the cause of action of defendant in error (plaintiff below), if any, arose solely and exclusively under the expressed allegations of his petition by virtue of an act by the Congress of the United States, entitled: "An Act Relating to Liability by Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large 65) as amended April 5, 1910, (36 Statutes at Large 291), as also by virtue of the terms of an act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893, (27 Statutes at Large 531) as amended March 2, 1903, (32 Statutes at Large 943), and the trial court and the Supreme Court of the State of Oklahoma, in its decision of this cause, erred in the administration of those acts as applied to this cause.

13. That the cause of action of defendant in error (plaintiff below), if any, arose solely and exclusively under the expressed allegations of his petition by virtue of an act of the Congress of the United States, entitled: "An act Relating to Liability by Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, (35 Statutes at Large 65) as amended April 5, 1910, (36 Statutes at Large 291), as also by virtue of the terms of an act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other Purposes," approved March 2, 1893 (27 Statutes at Large 531) as

12 amended March 2, 1903, (32 Statutes at Large 943), and the trial court and the Supreme Court of the State of Oklahoma, in its decision of this cause erred in holding that the facts adduced at the trial of this cause and appearing in the record of said Supreme Court of the State of Oklahoma showed any negligence on the part of the defendant (plaintiff in error herein).

14. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that said District Court of Garfield County, Oklahoma, wrongfully and erroneously refused to give to the jury defendant's requested instructions Nos. 1, 11, 17 and 22.

Wherefore, for these and other manifest errors appearing in the

record, the said The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Oklahoma be reversed and set aside and held for naught, and that the judgment be rendered for plaintiff in error, granting it its rights and immunities under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE,  
K. W. SHARTEL,

*Attorneys for The Chicago, Rock Island &  
Pacific Railway Company, Plaintiff in Error.*

13 Filed May 8, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6528.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Defendant in Error.

*Order Granting Writ of Error from the Supreme Court of the  
United States.*

Upon reading the petition and assignment of error of The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, praying for the allowance of a writ of error from the Supreme Court of the United States to this court, to reverse the judgment of this court heretofore rendered, to-wit: on the 13th day of April, A. D., 1915, and it appearing from said petition and the record in this cause that a proper cause for the allowance of said writ is presented, it is ordered that the same be and is hereby allowed.

It is further considered, ordered and adjudged that the amount of security, which the said plaintiff in error shall give and furnish upon said writ of error, be, and hereby is, fixed at Seventeen Thousand Dollars, and that said security shall be by bond conditioned, according to law and with sureties to be approved by the Chief Justice of the Supreme Court of the State of Oklahoma, and upon the giving and approval of such bond all further proceedings in

this court be suspended and stayed until the determination  
14 of said writ of error in the Supreme Court of the United States.

Done this 8th day of May, A. D., 1915.

[SEAL.]

MATTHEW J. KANE,  
*Chief Justice of the Supreme Court  
of the State of Oklahoma.*

Attest:

WM. M. FRANKLIN,  
*Clerk Supreme Court, Oklahoma.*



15 Filed May 10, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States of America.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plain-  
tiff in Error,

vs.

A. P. BOND, Administrator of the Estate of W. L. Turner, Deceased,  
Defendant in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Justices of the  
Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition  
of the judgment of a plea, which is in the said Supreme Court of  
the State of Oklahoma, before you, or some of you, being the highest  
court of law or equity of the said state, in which a decision could be  
had in the said suit between The Chicago, Rock Island & Pacific  
Railway Company, plaintiff in error, and A. P. Bond, administrator  
of the estate of William L. Turner, deceased, defendant in error,  
wherein was drawn in question a right asserted or a privilege or  
immunity claimed under and by virtue of a statute of the United  
States of America, and the said judgment and decision is against  
such right, privilege or immunity as asserted;

Whereby, a manifest error hath happened to the great damage of  
the said The Chicago, Rock Island & Pacific Railway Company,  
plaintiff in error, as by its complaint appears.

16 We being willing that error, if any hath been, should be  
duly corrected and full and speedy justice done to the parties  
aforesaid in this behalf, do command you, if judgment be therein  
given, that then under your seal distinctly and openly you send the  
record and proceedings aforesaid, with all things concerning the  
same, to the Supreme Court of the United States, together with this  
writ, so that you may have them at Washington on the 9th day of  
June, A. D., 1915, next, in the said Supreme Court to be then and  
there held, that the record and proceedings aforesaid being inspected,  
the said Supreme Court may cause to be further done therein to  
correct that error, what of right and according to the laws and  
customs of the United States should be done.

Witness, the Honorable E. D. White, Chief Justice of the Supreme  
Court of the United States, the 10th day of May, in the year of  
our Lord, one thousand nine hundred and fifteen.

[Seal of the United States District Court, Western District of  
Oklahoma.]

ARNOLD C. DOLDE,

*Clerk of the District Court of the*

*United States for the Western Dis-*

*trict of the State of Oklahoma.*

Writ of Error Approved.

MATTHEW J. KANE,

*Chief Justice of the Supreme Court  
of the State of Oklahoma.*

17 Filed May 10, 1915. William M. Franklin, Clerk.  
In the Supreme Court of the State of Oklahoma.

No. 6528.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Defendant in Error.

*Bond.*

Know all men by these presents, That we, The Chicago, Rock Island and Pacific Railway Company, a corporation, as principal, and H. T. Smith and Otto A. Shuttee, as sureties, are held and firmly bound unto A. P. Bond, Administrator of the Estate of Wm. L. Turner, deceased, defendant in error, above named, in the sum of Seventeen Thousand Dollars, (\$17,000.00), lawful money of the United States of America, to the payment of which well and truly to be made, the said principal and the said sureties bind themselves, their and each of their successors, administrators, executors, representatives and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 30th day of April A. D., 1915.

Whereas, in the above entitled cause the Supreme Court of the State of Oklahoma, rendered its judgment on the 13th day of April, A. D., 1915, affirming the judgment of the District Court of Garfield County, Oklahoma, in said cause and the said The Chicago, Rock Island and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said Supreme Court of the State of Oklahoma, to reverse the judgment in the aforesaid suit, and a citation directed to the said A. P. Bond,

18 Administrator of the estate of Wm. L. Turner, deceased, citing and admonishing him to be and appear at the Supreme Court of the United States at Washington, within thirty (30) days from the date thereof;

Now, Therefore, the condition of this obligation is such that if the said The Chicago, Rock Island and Pacific Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if plaintiff in error fails to make its plea good, and pay off and discharge the final judgment, damages for delay, and costs accrued, with interest as by law required, then the above obligation to be void; otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,  
*Principal.*

C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE,  
K. W. SHARTEL,

*Its Attorney.*

OTTO A. SHUTTEE,  
H. T. SMITH, *Sureties.*

STATE OF OKLAHOMA,  
County of Canadian, ss:

I, H. T. Smith of Lawful age, being first duly sworn, on my oath depose and say: That I am a resident of Canadian County, State of Oklahoma, and that I own property, real and personal in said Canadian County, in said State of the value of more than Seventeen Thousand Dollars (\$17,000.00) over and above my legal exemptions, debts and liabilities.

H. T. SMITH

Subscribed and sworn to before me this 10 day of May, 1915.

[SEAL.]

GERTRUDE CORNELIUS,

*Notary Public.*

My Commission expires April 18, 1917.

19 STATE OF OKLAHOMA,  
County of Canadian, ss:

I, Otto A. Shutee, of lawful age, being first duly sworn, on my oath depose and say: That I am a resident of Canadian County, State of Oklahoma, and that I own property, real and personal in said Canadian County, in said State of the value of more than Seventeen Thousand Dollars (\$17,000.00) over and above my local exemptions, debts and liabilities.

OTTO A. SHUTTEE.

Subscribed and sworn to before me this 10 day of May, 1915.

[SEAL.]

GERTRUDE CORNELIUS,

*Notary Public.*

My Commission expires April 18, 1917.

Bond Approved:

MATTHEW J. KANE,

*Chief Justice of the Supreme Court  
of the State of Oklahoma.*

20 Filed May 8, 1915, William M. Franklin, Clerk.

In the Matter of the Petition in Error, and the Assignments of Error, for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

Case No. 6528.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, and Its Receivers, R. U. Mudge and Jacob M. Dickinson, Petitioners for Writ,

v.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Respondent.

Respondent comes now by reason of notice, in above entitled matter, pending before the Honorable Mr. Chief Justice Kane of the Supreme Court of the State of Oklahoma, and sheweth:

1. That this is a cause commenced in the District court of Garfield County, Oklahoma, under and by virtue of an act of the Congress of the United States commonly called the Federal Employers' Liability Act, (35 St. at L. 65), that the above named Railway Company denied that said cause arises under said act, as by Exhibit A, hereto attached, that it was overruled in said matter by the United States District Court for the Western District of Oklahoma, as appears by exhibit B, hereto attached.

2. That said petition in, and assignments of, error, present no right asserted under laws of the United States by the plaintiffs in error and decided adversely to such assertion or claim by the Supreme Court of the State of Oklahoma.

21 1 (a). The assignment of errors does not show that in the final decision of the Supreme Court of Oklahoma that a decision could be had in this action wherein is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.

Nor that there is drawn in question the validity of a statute of, or an authority exercised under the State of Oklahoma, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

Nor that any right, title, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decree is against the title, right, privilege, or immunity especially set up or claimed by either party, under such constitution, treaty, statute, commission or authority;

That unless one or more of the foregoing allegations is made or shown to exist, in the assignments of error, that the Supreme Court of the United States will be wholly without jurisdiction in the cause, and will refuse to re-examine, or to reverse or to affirm the Supreme Court of Oklahoma, upon a writ of error, whereby it will affirmatively appear that this application for appeal has no object but to effect delay in the cause.

That this condition exists by reason of the fact that the enumeration above contains all the questions which the Supreme Court of the United States can review as allowed by the Judicial Code of the United States, Section 237.

22 3. That in said cause the Petitioners claimed no right under the laws of the United States for trial in the courts of the United States to the exclusion of the courts of the State of Oklahoma except by Petition for Removal, exhibit A, and this was not denied by the State Court, but was denied by the United States District Court for the Western District of Oklahoma, and the cause remanded to the state court for trial in which it originated, for which denial petitioners can not have review in the Supreme Court of the United States.

4. That the validity of no law, treaty or act of the United States was called in question by said trial, nor asserted in the action, and petitioners do not now deny, that if the facts are as declared by the Supreme Court of the State of Oklahoma, that the said Em-

ployer's Liability act is the governing law of the case, and was correctly applied.

5. That petitioners are not entitled to review of the facts as found by the trial court and the Supreme Court without, in the assignment of error pointing out the specific error in such findings, which is not done.

6. That the action is based upon a statute of the United States, that the petitioners denied its application, that this was denied to petitioners by the Federal Court, and that now, writ of error from the United States Supreme Court to the Supreme Court of the State of Oklahoma is sought, such denial can not and will not be reviewed by the highest Federal Court.

23 7. That the petitioners being denied the right of trial in the District Court of the United States, error can not be predicated of such action by error to the Supreme Court of the State of Oklahoma.

8. That it is manifest that the petition in error and the assignments in error accompanying the same are interposed solely for delay.

9. That the questions raised by said petition and assignment of errors are so frivolous as not to need further argument.

10. That a writ of error is not an abstract right of petitioners, but depends upon the assignment of such errors on the part of the lower court as to carry conviction that the cause should be reviewed, and such grant rests in the sound discretion of the Justice to whom application is made.

Wherefore defendant in error suggests that a writ of error be denied, but if same is granted, prays that these objections be attached to the order granting such writ, and transmitted with the record to the Clerk of the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Oklahoma.

JOHN C. MOORE,

*Attorney and of Counsel for Respondent.*

24

# EXHIBIT A.

In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

To the above named A. P. Bond, Administrator of the Estate of William L. Turner, Deceased, plaintiff, and to John C. Moore, his attorney of record:

You, and each of you are hereby notified that the defendant will on the 24th day of June, 1913, file in the above entitled court its

petition and bond for the removal of the above entitled cause to the United States District Court for the Western District of the State of Oklahoma.

C. O. BLAKE,  
H. B. LOW,  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE, &  
ROBERTS & CURRAN,  
*Attorneys for Defendant.*

I, the undersigned, attorney of record for A. P. Bond, Administrator of the estate of William L. Turner, deceased, the above named plaintiff, hereby acknowledge service of a copy of the above notice on me this 24 day of June, 1913.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

25 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Petition for Removal.*

To the Honorable District Court in and for Garfield County, State of Oklahoma:

Comes now your petitioner, the Chicago, Rock Island and Pacific Railway Company, the above named defendant, by its attorneys, and respectfully represents to this Honorable Court:

First. That on the fourth day of June, 1913, the above named plaintiff commenced this action in this court to recover the sum of Thirty Five Thousand (\$35,000.00) Dollars, damages alleged to have been sustained by the widow and children of William L. Turner, deceased, by reason of the death of said William L. Turner while crossing the yards and station grounds of this defendant at the City of Enid, Oklahoma.

Second. Your petitioner further avers that the time has not elapsed within which the defendant is required by the laws of the State of Oklahoma, or by the rules of the District Court of Garfield County, in the State of Oklahoma, to answer or plead to the petition of the plaintiff herein.

Third. Your petitioner avers that the plaintiff, A. P. Bond, Administrator of the estate of William L. Turner, deceased, was at the time of the commencement of this suit, and ever since has been and



of the proceedings of said court on Thursday, September 18th. A. D., 1913, Honorable John H. Cotteral, presiding.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Guthrie in said District this 10th. day of October, A. D., 1913.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE, *Clerk*,  
By W. W. HAWS, *Deputy*.

29

### *Argument.*

The case is one arising directly under a law of the United States, which the Plaintiff below originally invoked as his cause of action. It differs from common law actions, and from many State statutory actions for damages for personal injuries. The fellow servant doctrine is eliminated. The contributory negligence feature is changed. The assumption of risk is modified. The right to contract is modified. The appointment of a personal representative is mandatory. The distribution of the judgment, is for the jury.

The defendant below took issue, holding the Federal statute not applicable. To do so it added to its petition for removal the words: "Seventh:—Your petitioner further avers that the said William L. Turner, deceased, for whose death this suit is brought, was not at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the states, or engaged in interstate commerce."

These words do not set up a new or different state of facts, differing from those alleged in the original cause of action, but simply denies their legal effect. Hence, on removal the District Judge of the United States Court in taking the testimony and trying the cause, necessarily found, and had to find that plaintiff's construction was correct. By that finding the facts alleged in plaintiff's petition or complaint were by the United States Court held against the defendant, who had invoked the Federal Jurisdiction. As the statute denies suing out error on an order of remand, and as defendant knew this, it became estopped further to plead that the case is not one arising under the law of the United States.

30

This action of the Federal Court, in view of the statute of the United States forbidding writ of error founded on a remand, operates to forbid the plaintiff in error from now alleging that the action is not one arising under said Federal Act. Error can not be predicated of the action of the United States District Court, and hence can not be a proper subject for assignment of error in this petition for writ of error, or rather in the assignments of error, and if this is the base rock requirement, then the writ should be denied.

For petitioners to now allege that the deceased was an independent contractor, would be to allege that the cause is not one arising under the Employers' Liability Act, and would be predicated error of the order of remand. This can not be done.

In denying that the case is not one arising under the Federal Act, the defendant did not thereby invoke a federal law, nor raise a Federal question for its protection, nor did the Supreme Court of Oklahoma deny defendant any such right asserted in said cause.

Defendant probably, by moving to remove the cause to a Federal court, raised a right under a federal law, but in this he was not denied this right by the state court, but solely by the Federal court. So, it is true, that it has not been denied a right asserted for its protection under a law of the United States by the state court. The same is true of the matter of the Safety Appliance act. Plaintiff invoked it and alleged it, but defendant simply denied that the fact brought the case under that act.

31 The defendant at no time has called in question either of the three Federal acts, The Employers' Liability, the Safety Appliance, nor the act forbidding writ of error, so that no Federal law has in point of fact been called in question, but all that has been done in any instance is to con-true the legal effect of the facts of the case.

The plaintiff in error perhaps does not agree with the court as to the facts in the cause, but has so far not disagreed that the law as applied to the facts as found, has been correctly applied to those declared facts.

Regarding the facts as found plaintiff in error assigned no error of the testimony as taken in the trial court and insisted on same in the Supreme Court of the State, and it is now too late to make such assignment of error, after such neglect.

It is not in disagreement what the law is that has afflicted plaintiff in error, but contending that something else was the fact. Thus he contended that the deceased was not going on the business of the defendant, but on his own private business. Defendant admits however that if deceased was going on the business that the Supreme Court of Oklahoma found he was, that such business was interstate commerce. Defendant does not deny that if deceased was not an independent contractor, that he was an employe of the defendant. Defendant's grievance is that he did not get the facts found, and that plaintiff did get them found, but admits that if the facts are as found, then the law is correctly applied.

32 If the Federal District Court had passed upon plaintiff's petition as a plea, the decision would have been like ruling on a demurrer, but he took defendant's allegation seriously, and ordered and had a trial on the facts of the case, to determine the jurisdiction, the result being that he necessarily found from the evidence the facts, as the Supreme Court of Oklahoma did from the case-made before it. The facts as appearing in the trial were those facts required by the Employers' Liability Act to exist in order to found a case. Defendant, knowing that error might not be predicated of the remand, took the risk of estoppel, and I think it elementary, that after that trial the defendant could no longer urge that the facts exist otherwise, or be allowed to continue to litigate that which the Federal Court had decided. We were estopped, both of us, to assert that the cause was not one arising under the act. Plaintiff was bound, how-

ever to get into the record the proof that the railway company was a common carrier engaged in commerce between the states, but this the defendant admits. Then to prove that the injured man was an employe and was performing an act of interstate commerce when killed. All this was done and is incorporated in the case-made. So, estoppel prevents proof that the facts were otherwise, but proof that it was so, was required, and was made. The estoppel, therefore eliminates the right of petitioners to include the questions decided by the Federal Court. I do not hold this as to the negligence, and if material error is shown as regarding negligence involving a Federal question asserted by petitioners and decided against them, then there is a question for review.

33

OKLAHOMA CITY, OKLA., May 8, 1915.

Received a copy of the foregoing showings, exhibits A and B, and Argument, on the question of the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma to send up the record of the cause entitled The Chicago, Rock Island and Pacific Railway Company a Corporation, and R. U. Mudge and Jacob M. Dickinson, Receivers, Plaintiffs in Error v. A. P. Bond, Administrator of the Estate of William L. Turner, Deceased, Defendant in Error, decided and opinion filed April 13, 1915.

C. O. BLAKE.  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE,  
K. W. SHARTEL.

*Attorneys and of Counsel for Petitioners in Error.*

34 Filed Jun- 16, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6528.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased.

*Petition in Error.*

The said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, alleges and shows to the Court that at all times hereafter mentioned it was and now is a corporation organized and existing according to law, under and by virtue of the laws of the states of Illinois and Iowa with its principal place of business at the city of Chicago, in said state of Illinois, and owning and

operating a line of railroad running from said city of Chicago, into and through the intermediate states and into and through the state of Oklahoma, and that on the 3rd day of December, 1913, A. P. Bond as administrator of the estate of William L. Turner, deceased, obtained a judgment in the District Court of Garfield County, State of Oklahoma, by the consideration of said court for the sum of Seven Thousand Five Hundred Eighty Three Dollars (\$7,583.00) and cost of suit, against the said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, in a certain action then pending in said District Court, wherein said plaintiff in error was defendant and said defendant in error was plaintiff, and that 35-37 the motion of the plaintiff in error for a new trial in said suit was overruled on December 22nd, 1913, an original case made of which judgment and the pleadings and proceedings had in said action in said District Court is hereto attached and made a part of this petition in error.

Said. The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, alleges that there is error in said judgment and proceedings affecting materially the substantial rights of plaintiff in error in this, to wit:

First. That said court erred in overruling the motion of the plaintiff in error for a new trial.

Second. That said court erred in entering judgment in favor of the defendants in error and against the plaintiff in error.

Wherefore, plaintiff in error prays that said judgment be reversed, set aside and held for naught and that this cause be remanded to the trial court with instructions to render a judgment in behalf of the plaintiff in error dismissing the action and for all such other and further relief as to the Court may seem meet and proper.

C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE,  
J. G. GAMBLE,  
K. W. SHARTEL &  
ROBERTS & CURRAN,  
*Attorneys for Plaintiff in Error.*

38 Filed Mar. 21, 1914. Geo. M. Seifers, Clerk District Court.

In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Filed June 16, 1914. W. H. L. Campbell, Clerk.

*Case-Made.*

Be it remembered: That on, to-wit, the 4th, day of June 1913, the above named plaintiff, A. P. Bond, Administrator of the Estate of William L. Turner, deceased, commenced an action in the District court, within and for the county of Garfield, State of Oklahoma, against the above named defendant, the Chicago, Rock Island and Pacific Railway Company, by filing in said court a petition, wherein said plaintiff sought to recover from the said defendant, the sum of thirty-five thousand (\$35,000.00) dollars damages alleged to have been sustained by the widow and children of the said William L. Turner, on account of the death of the said William L. Turner, alleged to have been caused by the negligent act of the Chicago, Rock Island and Pacific Railway Company, on July 28th, 1912.

Summons was duly issued and served in said cause.

And, on June 24th, 1913, the said defendant filed its petition and bond for the removal of said cause to the District court of the United States, for the Western District of Oklahoma, and on the 18th, day of September 1913, the said cause was remanded by the District court of the United States, for the Western District of Oklahoma, to the said District court of Garfield County, Oklahoma, and a copy of the order of the said District court of United States, for the Western District of Oklahoma, so remanding the said cause, was filed in the office of the Clerk of said District court of Garfield County, Oklahoma, on October 11th, 1913.

And, further, that on September 23rd, 1913, said defendant filed said cause in the District court of Garfield County, Oklahoma, its motion to strike from the petition, certain portions therein set forth, which said motion was by the court, sustained on October 20th, 1913.

The Plaintiff was allowed to file an amended petition instanter, and the defendant allowed ten (10) days thereafter within which to plead to the said amended petition.

And, on October 24th, 1913, the said plaintiff filed an amended petition, which is in words and figures as follows, to-wit:

40 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
a Corporation, Defendant.

Action for Damages.

*Plaintiff's First Amended Petition.*

The plaintiff by leave of court first had, files this his first amended petition, and for cause of action states:

1. That William L. Turner departed this life on the 28 day of July, 1912, at Enid, Garfield County, Oklahoma, leaving as all and his only heirs, and persons dependent upon him for support and to whose support he contributed, his widow, Ida M. Turner, aged forty years, residing at Enid, Oklahoma, Nellie Munger, his daughter, aged twenty-two years, residing at Creston in the State of Iowa, Annie Foley, his daughter, aged twenty years, residing at Enid, Oklahoma, and the following residing with their mother, the widow above named at Enid, Oklahoma, to wit:—Vera Turner, his daughter, aged fifteen years, Mary Turner his daughter, aged ten years, Dortha, his daughter, aged eight years, William L. his son, aged six years, Bessie, his daughter, aged four years, and Austin L., his son, aged one year.

2. That thereafter to wit, on the fourth day of June, 1913, this plaintiff was, by the County Court of Garfield County, Oklahoma, duly and legally appointed Administrator of the estate of the said William L. Turner, deceased, the said court then and there having full power and authority to make said appointment, and thereupon, and before filing this action he duly and legally qualified as such, and entered upon his duties as such administrator, and  
41 as such he brings this action for the benefit of said widow and children.

3. That the Chicago, Rock Island and Pacific Railway Company, defendant, is now, was on the 28 day of July, 1912, and for several years prior thereto, continuously until the present time has been a common carrier by railroad, engaged in interstate commerce between the States of Kansas, Oklahoma, Texas and other States of the American Union, during all which time it has owned, and now owns, operated and now operates, a line of railway, between the said states, which line passes through Garfield County, Oklahoma, and through the incorporated limits of the city of Enid, in said County, as do all other tracks, of said road hereinafter described. The said tracks being: The House track, which runs by the side of the freight house on its east side, and next this is the Main track, then the Passing track, then next track Number one, and next track number two, and next track Number Three, and next Track Number



Four, and next Track Number Five, and next Track Number Six, and last the dead track, which connects only at the south end with the line of road. All these tracks are parallel, and run nearly from the north to the south, but bear a little to the west as they proceed to the south. At the south end, near their termination, are located coal chutes, into the pockets or tipples of which, coal is shoveled from cars set on the chutes, for use of all engines, local and interstate.

4. That the said City of Enid is a City of the First class under the definitions of the statutes of the State of Oklahoma, and has adopted a charter under and by virtue of power granted to it by the Constitution and laws of the State of Oklahoma, among which powers is that to regulate the speed of all trains within the limits of said City, whether on its main line or on the switch tracks within the limits of said City, and that in pursuance of such power it has fixed the speed of such trains at ten miles an hour, beyond which it is unlawful to proceed.

42 5. That said William L. Turner, deceased, on the 28 day of July, 1912, that being the day of his being killed as herein-after stated, was in the employ of the said railway company under two distinct labor contracts, one for unloading coal into the said coal pockets from cars on the chutes, to gather up drippings from the chutes and load them on cars or engines as the company might direct, to unload sand for the company at such places as the company might require, to unload cordwood for the company in such piles on the right of way at Enid, as the Company might direct, to load cinders on the cars for the company, to gather up coal tickets which enginemen and others in charge of engines were required to deposit in boxes at the said chutes when taking coal, and daily turn them into the freight house office of the company, to report daily all the coal unloaded by him, and to order coal set into the chutes for unloading. This contract is marked exhibit A and attached to the original petition herein, and hereto referred to and made a part of this petition. The other of said contracts was for cooping cars to hold grain for transportation by said company out of the State of Oklahoma. In all of these duties he was subject to the orders and directions of the company. Other duties imposed upon him and which he performed, was transferring freight, both interstate and local from cars to cars for further transportation. That he was actively engaged in these duties when killed by the negligence of the defendant company as hereinafter set out. His duties were of such a character that he was called to all parts of the yards and tracks above mentioned. Incident to the duties thus required, and in order to have the coal cars of the company unloaded, he conferred with industrial concerns at the sides of the switch tracks about having cars set in for unloading, and in order to unload same.

6. That on the 28 day of July, 1912, just before the hour of five o'clock in the afternoon, he had taken the coal tickets  
43 from the boxes, at which time the whole southern limit of the switch yards were clear of any cars or engines. The day was Sunday, and on that day no switching was done in the yards,

there being but one switch engine and switch crew at Enid, whose duties were those of switching and this engine and crew were that day not at work. There was that afternoon a strong and boisterous wind blowing from the south, but a little more westerly than the trend of the tracks, thus crossing the tracks as it passed north, in a long sharp angle. This wind was of such character that smoke from engines was blown down and around objects near the ground, so that they were hidden in it.

7. After taking his coal tickets from the boxes, he went to the Enid Mill and Elevator Company, and was there conversing when a train whistled from the south for the station. Taking out his watch, he said, "that is Twenty Four," that train being a large finely equipped passenger train, and he further said, "I must turn in my coal tickets and order coal set on the chutes," and immediately started toward the freight house where was the office in which he must go to deliver his coal tickets and order coal for the chutes.

8. The train Twenty Four, an interstate passenger train was thundering in, passing the chutes with great noise and confusion, with its bell, its whistle, its putting on air, clanging of cars, and making much steam and smoke. The strong wind carried the steam and smoke near the ground, and hid all objects which it engulfed. That among such objects thus hidden, was road engine number 2113, just in from Kansas, with an interstate train, from a portion of which it had uncoupled, at the north end of the switches, taking with it its tender, one or two flat cars, and two or more box cars, making in interstate commerce count, not less than five cars, and perhaps, six. After uncoupling it proceeded with its cars south

44 along the Main track to the chutes above mentioned without being observed by said Turner, and had just entered upon track two at the chutes out of the way of Twenty Four, just coming from the south. At this moment Turner was rounding the last car in the line which prevented his going directly across the tracks from the mill to the freight house, and in so doing had to go further south than the entrance to the freight house. He crossed tracks until he came to track Two, and between this and track three he walked for a distance further north in order to cross more directly toward the freight house. All this time Twenty Four was coming toward him, and knowing that no cars or engine were south of him, and the switch crew being not at work, his attention was mainly directed to Twenty Four. But engine 2113 with its five cars, all equipped with safety appliances and train power brakes, and all coupled up and in perfect order with the said engine, and moving north on track two, near to and parallel with the track on which Twenty Four was coming in, being the Main Track, had not attracted his attention, being in the smoke and invisible, and not making noise because not using its power train brakes, or giving signals nor making warnings of any kind, but running at greater speed than allowed by the ordinances of said City, and in violation of a statute of the United States as hereinafter more particularly set out. Turner continued to walk in the space between track two and track three until he should arrive at the proper point to cross over that track toward the freight

house. His back was thus toward the advancing train on track two. He did not observe its approach, but was seen by the fireman from the engine, and by a brakeman on the north end of the advancing flat car which was the furthest north of all the cars of that train. He stepped upon the track to cross it, and had proceeded so far, that he had set his foot down outside the west rail, about a foot

45 from it, and the train was rapidly approaching him with no signals of warning, and running in violation of statute as herein explained, by which it was not controlled in its speed, and the brakeman gave a keen yell which caused Turner to turn to the right to ascertain its cause, without, however, moving his feet, and his body being thus thrown in a strain, he could not recover himself and was struck by the train, which would likely not have happened but for said train being run without the use of its train power brakes, and so the running of said train in violation of said statute contributed to cause his death. That in turning as above stated, the left foot remained over the west rail, and was there cut off and lay outside that rail. His body was thrown down on its face, and the top of his head crushed off down to the ears and eyes, on the east rail, while he at the time of being arrested in his walk was moving toward the northwest. That the yell of the brakeman in arresting his progress, and the unlawful running of said train contributed to the killing of said Turner as above set forth.

9. That in pushing said cars by said engine No. 2113 as stated and by which the said William L. Turner was killed, the said engine and cars, and as a train, were operated and used by the engine-man and train crew in violation of a statute of the United States, to wit:—Section 2 of an act to amend an Act entitled, An Act to protect the safety of employes and travelers upon railroads by common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes, approved March second, eighteen hundred and ninety three, and amended April first, eighteen hundred and ninety six, in that the continuous train power brakes with which said engine and cars were equipped were not used and operated by the engineer or other person in charge of said engine, 2113, while backing on track two as heretofore stated, nor at  
46 any time before the said train had reached said Turner nor thereafter, until the whole of said train had passed entirely over his body and as much as three car lengths farther, and that the speed of said engine and cars was not placed under the control and power of said continuous power brakes, but was proceeding under the force of the engine, pushing, and such train power brakes were not then and there used for stopping, nor for other purpose. That said act was in further violation of said statute in this, that it was in violation of a rule of the Interstate Commerce Commission of the United States made on the 6 day of June, 1910, made under and by virtue of the requirement of the said section above named, directing said order to be made, that for the reasons above stated the said train was not controlled in its speed, and this caused

said train to strike, kill and pass over the body of the said William L. Turner.

10. Having thus given a detail of the acts leading up to the killing and the killing itself, plaintiff now says: that the deceased, William L. Turner, was killed by the defendant's negligence, carelessness, wrongfulness and unlawfulness, and the incompetency of its servants, agents and employes, while it was engaged as a common carrier by railroad in interstate commerce between the states, and while the said William L. Turner was an employe of defendant, and engaged at the time he was killed in doing an act of interstate commerce for the defendant and that the several of such negligences are as follows:

(a) By starting the said engine, 2113 and its train backing on track two, while train number twenty four was coming in on the main track and very near to it, with the two tracks running nearly parallel.

(b) By starting and running in such proximity amid the smoke and steam which obscured it.

(c) By failing to give the blasts from the whistle which the rules require before commencing to back.

(d) By neglecting, under the circumstances to ring the bell and sound the whistle frequently while backing.

47 (e) By continuing to back before Twenty Four came to a stop.

(f) By commencing to back at a time and continuing so to do that its signals, if given, were likely to be commingled with those of Twenty Four, and to be incapable of being misunderstood, thus causing confusion in the interpretation and endangering those who might be near.

(g) By the fact that its signals, if sounded, would be intermingled with those of Twenty Four, and be misunderstood.

(h) By failing to signal Turner, when seen walking between tracks two and three, to notify him of their presence and approach.

(i) When seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger.

(j) By the fireman in the cab with the engineman not having the engine slowed or stopped when he saw Turner entering on track two, until he should see that he had safely passed in the clear.

(k) By the fireman in the flat car when he saw Turner entering on track two failing to signal the engineer to stop or go slow until he could see that Turner was in the clear.

(l) By the brakeman not having in his hand any flag or other device for signalling the engineer or the fireman such as the rules of the company require brakemen to have when performing that class of duties at all times.

(m) By the brakeman being out of sight of the engineer and keeping out of his sight so that no signals could be seen if made.

48 (n) By the brakeman in waiting to give signal to Turner until he was in imminent peril, and then, instead of giving a train signal, which Turner well understood, he gave a loud and piercing yell, which caused Turner, who was unaware

of any danger, to stop and turn, and throw him in a position to be helpless with the rapidly running train.

(o) The engineer was guilty of negligence in running his train at high rate of speed and in not using the train power brakes by which he might have controlled its speed or have stopped it when signalled so to do. He was guilty of negligence in running his train in excess of the speed established by ordinance of the city.

(p) He was guilty of most culpable negligence in running his train in violation of the statute of the United States as heretofore detailed.

(q) That he was guilty of negligence in so running his train at such speed in the switch yards, in the City limits and at the same time not ringing his bell and sounding the whistle.

(r) That he was at fault and negligent, when he found that his brakeman was not in sight, that he did not stop his train and go to the brakeman and require him to keep in sight, that his signals could be seen.

(s) That said train crew had abundant opportunity to have saved the life of Turner, but did not undertake to do so until all chance was gone, and it was too late.

That from all the circumstances above set out the defendant was wholly and solely the cause of said Turner being killed, as stated, and that he, the said Turner was entirely free from any negligence in the circumstances. And Plaintiff therefore says, that the defendant, while engaged in interstate commerce as a common carrier by railroad, by the careless, negligent, wrongful and unlawful acts of its agents, servants and employes as above set out and detailed was guilty of negligence carelessness, wrongful and unlawful running of said engine number 2113 in backing in said track two and pushing said cars and engine over and killing him the said William L. Turner when he was at the time engaged in performing an act of interstate commerce for the defendant, as its employe, in said track two of said yards, in the city of Enid, Garfield County Oklahoma, at the time stated, and not through any contributory fault or negligence on his part.

11. That the deceased William L. Turner, at the time of his death was of the age of forty six years, and that he had an expectation of life for over twenty four years, that he had a sound, vigorous, healthy, industrious, capable and trained man in his occupation and had the confidence, trust, and esteem of the officials because of his accuracy, his diligence, his integrity, his attention to duty, his fidelity in obeying instructions, his intelligence and care of the property entrusted in his care, his caution in avoiding injury to others and himself, his long service with the company of twelve years in important stations necessary to carry on the business of an interstate railway, all of which are witnessed by the fact that he had thus served them for twelve years, constantly, and when killed was serving under a contract which was self renewable and continued to subsist until notice by either should terminate such contract. That during said twelve years of service he had by his diligence, management and labor earned Fifteen hundred dollars annually, and he

was earning at that rate when killed. That he annually expended upon his family the whole of said sum, so that his contribution to their support was, at his death the sum of Fifteen hundred dollars, each year, of which they are deprived by reason of his death.

That therefore, for the negligent, wrongful and unlawful killing of the said William L. Turner, at the place, at the time, and in the manner and form herein stated, the said defendant has  
50 damaged the said widow and children in the sum of thirty five thousand dollars, his prospective earnings for his expectation of life, for which plaintiff asks judgment that same may be distributed to the parties entitled thereto as their interests appear by law and that defendant pay the costs of this action.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Endorsed: No. 1452. Bond, Admr. v. C. R. I. & P. Ry. Co. First Amended Petition. Filed Oct. 24, 1913. Geo. M. Scifers, Clerk District Court, Chg.

51 Exhibits "A" and "B" attached to the original petition filed in this cause, which are referred to and made a part of the said amended petition, are in words and figures as follows:

52

*Agreement.*

This Agreement, made in duplicate this first day of November A. D. 1910, by and between The Chicago, Rock Island and Pacific Railway Company, a corporation, party of the first part, hereinafter called the "railway Company" and W. L. Turner, of Enid, Garfield County, Oklahoma, party of the second part, hereinafter called the "Contractor" witnesseth, that:

The parties hereto, for and in consideration of the covenants and agreements hereinafter set forth, and of the payment hereinafter provided for, covenant and agree, each with the other, as follows:

First. The contractor covenants and agrees, at his sole cost and expense, to furnish all the labor required and necessary to handle; and,

(a) to handle all the coal required by the Railway Company at Enid, Oklahoma, from either open or closed cars, or both, and to place same in coal chute pockets of the railway Company; to gather up all coal that falls from the coal chute pockets to the ground and place same on cars or engines as desired by the Railway Company.

(b) To break all coal to the size of four inch cubes or less before same is delivered to chutes or engines for engine use and to unload all coal for stationery boilers.

(c) To unload wood from cars to storage piles located on Railway Company's right of way in said City.

(d) To load cinders from said Railway Company's right of way to cars, at points designated by said Railway Company.



(e) To unload sand from cars furnished by said Railway Company at points designated by said Railway Company.

Second. The Railway Company agrees to pay to the Contractor in full compensation for services herein provided for, and the contractor agrees to accept the following rates, to-wit:

Nine (9) cents per ton for unloading coal from cars to chutes.

Nine (9) cents per ton for loading coal known as "Chute droppings" from the ground to cars. Provided, that where the cars so loaded shall be unloaded into the chutes the Railway Company shall pay an additional six (6) cents per ton for unloading such coal from cars to chutes.

Ten (10) cents per cord for unloading wood from cars to the storage piles of said Railway Company, said storage piles  
53 being located on said right of way in said City of Enid.

Eight (8) cents per cubic yard for loading cinders on said Railway Company's right of way upon the cars furnished for same by said Railway Company at the place where said Railway Company places said cars.

Eight (8) cents per cubic yard for unloading sand on said Railway Company's right of way for use of its engines.

It is expressly understood and agreed that the payment for all services in handling said coal from cars; said coal from ground, under chutes, known as "chute droppings" said wood from cars for storage piles; said cinders for cars; said sand for engine purposes, shall be made upon the estimates and records of the Railway Company as to the amount of coal handled from cars, coal handled from the ground under chutes, wood handled from cars to storage piles, cinders loaded into cars and sand handled for use of engines.

Third. The contractor shall at all times maintain a sufficient supply of coal in the pockets of the coal chutes at Enid, Oklahoma, for the requirements of the Railway Company, and shall break or crack all coal to sizes suitable for burning as shall be required by the Railway Company.

Fourth. The Contractor hereby expressly assumes all liability for all injuries to or death of persons in his employ, and all liability for injury to or loss of his property which may occur in the performance of this agreement, whether the same shall be occasioned by reason of the negligence of the Railway Company, its agents and employes, or otherwise, and the Contractor further covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, losses and recoveries for or on account of any such injuries or death and for or on account of any such injury to or loss of property, or for or on account of any injury to or death of persons in the employ of the Contractor when  
54 and while said persons may be in, upon or about the cars, engines, trains, tracks and premises of the Railway Company, and any injury to said Contractor while performing any services under this contract, which might be or have been delegated to his agents or employes.

The Contractor further expressly assumes all liability for injuries to or death of third persons, including the employes of the

Railway Company, and all liability for injury to or loss of the property of such persons, which may be occasioned by any act or omission or commission, negligent or otherwise, of the Contractor, his agents, servants and employees, while engaged in the performance of this agreement, and the Contractor covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, costs and recoveries for or on account of any such injuries to or loss of the property thereof; and the Contractor further covenants and agrees that the Railway Company shall not be liable in case of his death or injury while employed in the work herein set forth.

Fifth. The Contractor shall be punctual in the performance of his duties under this contract, and shall keep a sufficient number of men employed to unload the coal from cars into the coal chute pockets without unnecessary delay, and without causing the Railway Company any inconvenience or damage.

Sixth. This contract shall begin on the date hereof, and shall continue until terminated, as it may be by either party giving to the other fifteen (15) days' notice, in writing, of an intention to terminate the same, which notice shall specify the date on which the same shall terminate, unless said contract shall be sooner terminated as hereinafter provided.

Seventh. If at any time the Contractor shall fail, refuse or neglect faithfully to perform his duties under this contract, it is hereby agreed that the Railway Company shall have the right and option to at once terminate this contract, without being liable in damages therefor to said Contractor. The Railway Company, acting  
55 by its General Manager, or other agent authorized by him, shall be the sole judge as to whether the contractor is faithfully and satisfactorily performing the duties herein prescribed to be performed by him.

Eighth. The Railway Company agrees to furnish for the use of the Contractor, in performing the services required hereby, the necessary tools, including shovels, coal picks, lanterns, torches and oil for use of the men employed in handling coal through the chutes at Enid, Oklahoma. All such tools, supplies and appliances shall be and remain the property of the Railway Company, and at the termination of this contract shall be returned to the Railway Company by the Contractor, in good order and condition, ordinary wear and tear resulting from the proper use thereof excepted, and excepting also the oil properly used in order to carry out the provisions of this contract. In the event that any such tools or appliances shall be destroyed or injured so that they are unfit for use by any act of the Contractor or his employees, or if they shall be lost or stolen, then in either case, the Contractor agrees to pay the Railway Company the cost of said tools or appliances so destroyed, damaged, lost or stolen, and agrees that the Railway Company may deduct the amount of such cost from any payment or payments to be made by it to the Contractor.

Ninth. It is hereby agreed and understood that the Contractor shall be deemed and held as the original contractor, and the Rail-



way Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.

Tenth. The Railway Company shall keep a record of all coal delivered at the coal chutes at Enid, Oklahoma, for unloading, giving car numbers and the number of tons of coal in each car unloaded shall be determined by the billing of such car, and the Railway Company shall make settlements and pay the Contractor for handling coal upon basis of such handling. The Contractor shall make daily reports of the cars unloaded by him, and shall receive, collect and deliver to the duly authorized representative of the Railway Company, a ticket from each engineman, hostler or other employe, showing the number of tons of coal delivered to any engine.

Eleventh. Payment for work to be performed under the contract by the Contractor shall be made by the Railway Company monthly, on or before the twentieth day of each month, next succeeding that in which the work is performed.

Twelfth. This contract and all the terms and conditions, rights and obligations thereof, shall inure in favor of and be binding upon the heirs, administrators, executors, legal representatives and successors and assigns and lessees of both parties hereto; but the Contractor agrees that he will not assign or sublet any of the work herein provided for without the written consent thereto of the Railway Company.

In witness whereof, the Contractor has hereunto set his hand and seal and the Railway Company has caused this contract to be signed by its proper officer and its corporate seal to be hereunto affixed and attested, the day and year first above written. Executed in duplicate.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY CO.

By W. M. WHITENTON,

*Its General Manager.*

Attest:

CARL NYQUIST,  
*Assistant Secretary.*

W. L. TURNER,

*Party of the Second Part.*

Witnesses to signature of Party of the Second Part:

FORREST NAVE.  
JNO. R. WEISSINGER.

Approved (As to form)

THOS. R. BEMAN, *Ass't Gen'l, Att'y.*  
R. J. ROBERTS,  
H. M. HALLOCK,  
T. H. BEACOM.

57 This Agreement, made in duplicate and entered into this first day of October 1911, by and between The Chicago, Rock Island and Pacific Railway Company, hereinafter designated "First Party" party of the first part, and W. L. Turner, of Enid, Garfield County, State of Oklahoma, hereinafter designated "Second Party" party of the second part, witnesseth:

Whereas, the first party owns and operates a line of railroad into and through the City of Enid, Garfield County, Oklahoma, and is engaged in transporting, among other things, grain in bulk; and,

Whereas, in the transportation of such grain, it is necessary that the cars used therefor be prepared or coopered in a certain manner, so as to contain and prevent loss to such grain; and,

Whereas, the first party is desirous of having all cars necessary for use in such transportation at the City of Enid, Oklahoma, so prepared and coopered, in accordance with its rules and regulations with reference thereto; and,

Whereas, the second party is willing to perform such service for the compensation, in the manner and upon the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises and of the stipulations and agreements herein contained to be by the parties hereto respectively kept and performed, it is mutually agreed as follows:

First. The second party will prepare and cooper all cars which the Round House Foreman of the first party, at Enid, Oklahoma may direct to be so prepared, in the manner and in accordance with the following rules, to-wit:—

(a) Installing and Burlapping Grain Doors: Apply three standard grain doors to each car door and fasten to posts, using four No. 8 common wire nails in ends of each grain door. Cover with 7½ oz. burlap, one strip 8 feet long, 40 inches wide, and one strip 8 feet long, 20 inches wide, allowing it to overlap ends of grain door 6 inches and hang loose at the bottom, overlapping car floor 10 inches; also lap 2 inches where strips are joined on the doors. Attach burlap by applying two No. 3 lath lengthwise where same is  
58 joined and two lath at top. Burlap at ends of grain doors to be secured with one and one-half lath at each end. Use five No. 4 common wire nails to each full lath.

(b) Burlapping Ends of Cars: Apply one strip of 7½ oz. burlap 12 feet long and 40 inches wide at each end of car, allowing it to hang loose at bottom and overlap car floor 10 inches, extending around each corner of the car and overlapping the sides 21 inches. Secure to end and side of car with four No. 3 common lath applied at top and ends of burlap, using five No. 4 common wire nails to each full lath.

(c) Burlapping King Bolts: If King Bolts protrude through floor of car, place one strip of 7½ oz. burlap 20 inches wide and 40 inches long, doubled over each bolt and secure with lath.

(d) Patching Defects in Floor and Lining of Car: Place a piece of burlap over opening or defect and nail a board over same of

proper size, allowing the burlap to extend out several inches around the edges of the board.

(e) Cars Unfit for Grain Loading: Cars with broken end posts, loose side sheathings, leaky roof or other defects, making them unsuitable must not be coopered for grain loading.

(f) Making Lining and Sheathing of Car Grain Tight: Attention must be given to crevices and openings around the end posts and body braces at the belt rails. Where these posts and braces and brace rods pass down behind the linings, crevices are frequently found; these should be calked with oakum or some like material to prevent grain from leaking behind the lining. A strip of burlap should be applied to the sides of the car 36 inches long and 20 inches wide, just over the body bolster, on account of the strain that is on car at this point, frequently causing sheathing leaks.

(g) Applying Inspection Card (Form 333) to cars for loading: Inspection card (Form 333) must be placed on the car showing that it has been placed in condition for grain loading. This card to show the name of the inspector, station at which inspected, date, car number and initials.

Second. That all cars so prepared by the second party shall be inspected by the Round House Foreman of the first party at Enid, Oklahoma, who shall be the sole judge as to whether such preparation is in accordance with this contract. If it shall be determined by said Round House Foreman that the preparation of such cars is insufficient and not in accordance with the rules herein stated, the second party will do everything necessary to make the same conform to said rules.

Third. The first party will furnish to the second party all materials, of every kind, necessary for use in the preparation and coopering of said cars, and will pay to the second party, for the service rendered, thirty (30) cents for each car so prepared and coopered by him, such payment to be made on or before the 20th day of the month next succeeding that in which the service is performed.

Fourth. The second party agrees in all respects to fully indemnify, save and keep harmless the first party from any and all liability, loss, damage or injury of any kind whatsoever to the property of the first party, or to the property of others in its possession, as a common carrier or otherwise, or to the property of others on or adjoining its right of way, or on account of injury to or death of the employes or passengers of the first party, or on account of injury to or death of others, arising from or in any manner caused by or growing out of the preparation of cars for coopering and in connection with the coopering of cars as provided for herein, including the installing and burlapping of grain doors, burlapping of the ends of the car, burlapping of King bolts, patching defects in the floor of car or lining car or during general repair of the car to make the same fit for holding grain or in connection with such repair, or making lining and sheathing of car grain tight or in connection with any other work or preparation in and about cars, as covered by this contract, during the life of the same, irrespective of whether or not such liability, loss, damage or injury shall

arise from the negligence of any of such employes, passengers or persons.

Fifth. This agreement shall be effective from and after the date of its execution, and shall continue in full force and effect until terminated by either party hereto giving to the other thirty (30) days' notice in writing of its intention to so terminate the same.

In witness whereof, the first party has caused this agreement to be executed in its name by its duly authorized officer and its corporate seal to be hereunto affixed and attested by its Secretary, and the second party has hereunto set his hand and seal on this, the day and year first hereinabove written.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,

By C. W. JONES,

*Its General Manager.*

Attest:

CARL NYQUIST,

*Assistant Secretary.*

W. L. TURNER. [L. s.]

Witnesses:

T. H. WALLACE.

J. A. BOWMAN,

Approved (As to form):

THOS. R. BEMAN, A. G. A.

R. J. ROBERTS.

J. McGEE.

T. H. BEACOM.

61 And be it further remembered, that later and on the 4th day of November, 1913, and within the time allowed by the order of said court, herein before referred to, the defendant, The Chicago, Rock Island and Pacific Railway Company, filed its motion to strike from the amended petition of the plaintiff, certain portions thereof, which said motion is in words and figures as follows, to-wit:

62 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Motion to Strike.*

Comes now the above named defendant by its attorneys the undersigned and moves the court to strike from the amended petition of the plaintiff filed herein, paragraph numbered nine (9) thereof, being in words and figures as follows:

"9. That in pushing said cars by said engine No. 2113, as stated, and by which the said William L. Turner was killed, the said engine and cars, and as a train, were operated and used by the engineman and train crew in violation of a statute of the United States, to-wit: Section 2 of an act to amend an act entitled, an act to protect the safety of employees and travelers upon railroads by common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes approved March second, eighteen hundred and ninety three and amended April first, eighteen hundred and ninety six, in that the continuous train power brakes with which said engine and cars were equipped were not used and operated by the Engineer or other person in charge of said engine 2113 while backing on track two as heretofore stated, nor at any time before the said train, had reached said Turner nor thereafter, until the whole of said train had passed entirely over his body and as much as three car lengths farther, and that the speed of said engine and cars was not placed under the control and power of said continuous power brakes, but was proceeding under the force of the engine, pushing, and such train power brakes were not then and there used and operated to control the speed, nor for stopping, nor for other purpose. That said act was in further violation of said statute in this that it was in violation of a rule of the Interstate Commerce Commission of the United States made on the 6th day of June, 1910, made under and by virtue of the requirements of the said section above named, directing said order to be made; That for the reasons above stated the said train was not controlled in its speed, and this caused said train to strike, kill and pass over the body of the said William L. Turner"

63 and for grounds, in support of such motion avers:

That the matters hereinbefore set out and which it is moved to strike from the amended petition of the plaintiff is irrelevant and immaterial to the issues in this cause, that it does not comprise an allegation of fact or law; that it would only tend to confuse the minds of the jury upon a matter irrelevant to this cause.

Whereof the defendant prays judgment of the court.

ROBERTS & CURRAN,  
C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE, AND  
J. G. GAMBLE,

*Attorneys for Defendant.*

(Endorsed:) In the District Court of Garfield County, Oklahoma, A. P. Bond, Administrator, Plaintiff, versus, The Chicago, Rock Island and Pacific Railway Company, Defendant—Motion to Strike—Filed November 4, 1913, (S) Geo. M. Seifres, Clerk District Court.

64 Thereafter, and on November 5th, 1913, the court overruled the said motion of the defendant to strike from the said

amended petition of the plaintiff, certain portions thereof, to which action of the court the defendant then and there duly and legally excepted, and the defendant was granted leave to file a demurrer to the said amended petition of the plaintiff, which said demurrer is in words and figures as follows, to-wit:

65 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Demurrer.*

Now comes the defendant and demurs to the plaintiff's amended petition filed herein for the following reasons, to-wit:

First. Because the plaintiff has no legal capacity to sue.

Second. That there is a defect of parties plaintiff.

Third. That several causes of action are improperly joined.

Fourth. That the said amended petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against said defendant.

C. O. BLAKE,  
J. G. GAMBLE AND  
ROBERTS & CURRAN,  
*Attorneys for Defendant.*

(Endorsed:) No. 1452. In District Court, County of Garfield, Oklahoma, A. P. Bond, Adm'r of the estate of Wm. L. Turner, Dec'd Pl'f, vs. The Chicago, Rock Island and Pacific Railway Company, a Corporation, defendant—Demurrer—Filed November 5th, 1913, (S) Geo. M. Scifres, Clerk of the District Court—Robberts & Curran, Attorneys for Defendant.

66 And thereupon, and on the same day, the court overruled said demurrer of the defendant to the amended petition of the plaintiff, to which action of the court the defendant did then and there duly and legally except, and there was filed in this cause in said court, a journal entry of the order of the court overruling the said motion of the defendant to strike from the said plaintiff's amended petition, certain portions thereof, and overruling said demurrer of the defendant to plaintiff's amended petition, the said journal entry being in words and figures as follows, to-wit:

67 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Journal Entry.*

Now on this 5th day of November, 1913, at the regular term of said court, the motion of the defendant to strike paragraph nine (9) of the plaintiff's amended petition, came on to be heard; plaintiff appearing by his attorney John C. Moore, and the defendant appearing by its attorneys Robberts & Curran.

And the court after hearing the arguments of counsel and being fully advised in the premises, overrules said motion, to which ruling the defendant then and there duly excepted, which exception was allowed by the court.

Thereupon, by leave of court the defendant filed its demurrer to the plaintiff's amended petition; and the attorneys for the said parties being present, the said demurrer came on for hearing.

And the court, after hearing the arguments of counsel and being fully advised in the premises, overrules said demurrer, to which ruling the defendant then and there duly excepted, which exception was allowed by the court.

Thereupon, the defendant, on application, was allowed ten days from this date in which to file his answer to the plaintiff's amended petition.

JAMES W. STEEN, *Judge.*

O. K.

JOHN C. MOORE,  
*For Plaintiff.*

ROBBERTS & CURRAN.

(Endorsements on following page)

68 (Endorsed:) No. 1452. In District Court, County of Garfield, Oklahoma. A. P. Bond, Administrator of the Estate of W. L. Turner, Plaintiff, versus the C. R. I. & P. Ry. Co., Defendant—Journal Entry—Filed November 6th, 1913, (S). Geo. M. Scifres, Clerk District Court, J-24, P-493. Robberts & Curran, Attorneys for Defendant.

69 And thereafter, and on November 14th, 1913, and within the time allowed by the order of said court to the defendant within which to file its answer to the amended petition of the plaintiff, said defendant filed its answer to the amended petition of the plaintiff, which answer is in words and figures as follows, to-wit:



70 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Answer to Plaintiff's Amended Petition.*

Comes now the above named defendant, the Chicago, Rock Island and Pacific Railway Company, by its attorneys, the undersigned, and for its answer to the amended petition of the Plaintiff filed herein, denies each, all and singular the allegations therein contained, except such as are hereinafter expressly admitted to be true and expressly admits that it is a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, having its principal place of business at the City of Chicago, in said state of Illinois, and having and operating a line of railway into and through the State of Oklahoma and into and through the County of Garfield therein.

2. Further answering and for a separate defense, said defendant, the Chicago, Rock Island and Pacific Railway Company, avers that if the said William L. Turner received the injuries from which he died, as alleged in plaintiff's petition herein, and on account of which this suit is brought, which is not admitted but expressly denied, that the said injuries and death of the said William L. Turner were directly due to and proximately caused by the negligence and want of care on the part of the said William L. Turner, and that the said injuries to and death of the said William L. Turner were not contributed to or caused by the negligence or want of care on the part of this defendant.

71 3. Further answering and for a separate defense, said defendant, the Chicago, Rock Island and Pacific Railway Company avers that if the said William L. Turner received the injuries from which he died as alleged in plaintiff's petition, and on account of which this suit is brought, that the said William L. Turner was guilty of negligence and want of care directly and proximately contributing to his said alleged injuries and death in this, to-wit: That on the afternoon of July 28th, 1912, at about the hour of five o'clock, the said William L. Turner was walking between the tracks known as numbers two and three in the yards of the defendant at the City of Enid, Oklahoma, and was at such time in the place of safety; that the said William L. Turner while so walking between the said tracks and being in a place of safety, did fail to exercise ordinary care for his own safety before leaving his said place of safety and did step upon the said track number two, in defendant's said yards at the City of Enid, immediately in front of an approaching train,



by which he was struck and knocked down, sustaining the injuries which resulted in his death; that the said inattention, negligence and want of care on the part of the said William L. Turner, directly and proximately contributed to his injuries and death.

Wherefore, having fully answered, said defendant, the Chicago, Rock Island and Pacific Railway Company, prays to be hence dismissed with all its costs and expenses in this behalf laid out and expended.

ROBERTS & CURRAN,  
C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE AND  
J. G. GAMBLE,

*Attorneys for Defendant.*

(Endorsed:) No. 1452. In the District Court of Garfield County, Oklahoma—A. P. Bond Administrator Plaintiff, vs. The C. R. I. & P. Ry. Co., Defendant.—Answer to Plaintiff's amended Petition—Filed November 14th, 1913, (S) Geo. M. Scifres, Clerk District Court.

72 And be it further remembered, that on the 15th day of November 1913, the plaintiff filed his reply to the answer of the defendant, which reply is in words and figures as follows:

73 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Reply.*

Plaintiff, for Reply to defendant's answer, says, That he denies each and every allegation of negligence set up in defendant's answer, regarding the actions of the deceased, William L. Turner, and every other allegation therein alleged as defense to this action, and prays as heretofore prayed for relief.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

(Endorsed:) No. 1452—Bond Adm'r vs. C. R. I. & P. Ry. Co.—Reply—Filed November 15th, 1913, (S) Geo. M. Scifres, Clerk District Court.

74 Thereafter, and on November 19th, 1913, the plaintiff filed in this cause in this court, a motion for the production and inspection of certain documents, said motion being in words and figures as follows:

75 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Motion.*

The Plaintiff moves the court that within a time to be fixed by the court at furthest three days before the 28th, day of November 1913, the defendant be required to allow plaintiff inspection and copy, or inspection and leave to take copy, all the original coal tickets turned in to defendant by William L. Turner, deceased, on Sunday the 28th day of July 1912, personally, also, all other coal tickets that day obtained by defendant from the Enid chutes, obtained otherwise than from said Turner. Also, the original report of the Enid office of the coal used by engines, by returns as shown by coal tickets from engineers, hostlers or others in charge of engines, of the company between the hour of four o'clock Saturday evening, July 27, 1912, and half past five o'clock P. M. of the next day. Also the report of all trains which arrived in Enid over defendant's lines, including the number of each train, and of the engine pulling the same, the name of the engineer in charge of the engine, the hour of arrival, for the period between four o'clock P. M., Saturday July 27th, 1912, and five o'clock P. M., of the next day.

Plaintiff states that due notice of this motion was given the defendant and its attorneys of record, on the 14th day of November, 1913, in writing, and at the same time demand was made in writing for such inspection and copy, or demand for inspection and leave to take copy, as above set out, together with the statement that if defendant failed within four days, to-wit: the 18 day of November 1913, that this motion would be presented on this day.

76 Further, plaintiff says that the time is near for trial of this cause as the assignment shows, and that plaintiff must have time in which to inspect and take copies. Plaintiff further asks the court in ordering such inspection and copy, that unless the order be complied with, that such documents shall not by defendant be introduced in evidence, but that in lieu thereof such documents shall be considered as such documents as plaintiff shall by affidavit declare them to be.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Received a copy of this motion, this 19 day of November 1913.

ROBERTS & CURRAN,  
C. O. BLAKE, AND  
J. G. GAMBLE,  
*Attorneys for Defendant Railway Company.*

(Endorsed:) No. 1452—Bond, Adm'r—versus C. R. I. & P. Ry. Co. Motion for order for Documents—Filed November 19th, 1913.  
(S) Geo. M. Scifres—Clerk of District Court.

77 And, on November 21st, 1913, the court sustained the said motion of the plaintiff for the production and inspection of certain documents, and made and entered an order thereof, a journal entry of which was filed in this court in this cause on November 21st, 1913, and is in words and figures as follows:

78 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Order.*

In the above entitled cause it is ordered by the court, that the defendant, Railway Company, shall, on or before ten o'clock A. M. of the 28th day of November, 1913, furnish to the plaintiff for inspection and copy, or for inspection and leave to take copy, all the original coal tickets turned in to defendant by William L. Turner, now deceased, on Sunday, the 28th day of July, 1912, personally also, all other coal tickets that day obtained by defendant from the Enid chutes, obtained otherwise than from said Turner, also the original report of the Enid office of the coal used by engines, by returns as shown by coal tickets from Engineers, hostlers or others in charge of engines of the company between the hour of four o'clock P. M., of Saturday, July 27th, 1913, of 10 o'clock P. M., of the next day. Also the report of all trains which arrived in Enid over defendant's lines, including the number of each train and of the engine pulling the same, the name of the engineer in charge of the engine, and the hour of arrival, for the period between four o'clock P. M., of Saturday, July 27th, 1913, of 10 o'clock A. M., of the next day.

Dated this 7th day of November, 1913.

JAMES W. STEEN, *Judge.*

(Endorsed:) No. 1452, Bond. Adm'r vs. C. R. I. & P. Ry. Co.—order—Filed November 21st, 1913, (S) Geo. M. Scifres, Clerk District Court. J-24, P-508.

79 And thereafter, and on the 28th and 29th days of November 1913, and the 1st, 2nd and 3rd days of December, 1913, the following proceedings were had, to-wit:

80 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

*Reporter's Record.*

2d Copy.

Be it remembered. That on this 28th day of November, A. D., 1913, the same being a regular judicial day of the District Court in and for the County of Garfield, 20th Judicial District, State of Oklahoma, the plaintiff appearing in open court by John C. Moore, attorney, and the defendant appearing by W. H. Moore and Roberts & Curran, attorneys, and the above entitled cause coming on in its regular order for trial in said Court, with the Honorable James W. Steen sitting as Judge thereof, and a jury of twelve men, and both parties announcing ready for trial upon the issues joined, the following proceedings were had, viz:

**Appearances:**

Jno. C. Moore, of Enid, Okl., for Plaintiff.  
W. H. Moore of El Reno, Okl., for Defendant.  
Roberts & Curran, Enid, Okl., for Defendant  
W. R. Le Compte, Enid, Okl., Reporter.

81 Thereupon, a jury having been demanded, the Court directs the Clerk to call a jury of twelve men into the jury box, and the Clerk proceeds to call a jury from the jurors duly drawn, summoned and empaneled for jury service at this term of the District Court in and for said Garfield County, Oklahoma; And now there being twelve jurors in the jury box, called from the jury as aforesaid, the jurors are by the Clerk duly sworn to well and truly answer all questions propounded to them by the Court or under its direction touching their competency and qualifications to sit as trial jurors in the cause now on trial and now the jury is offered to counsel for plaintiff and defendant for examination and challenge, and the examination is made by both parties hereto and now as a juror is excused either for cause or upon per-emptory challenge another juror is by the Clerk called in his place, and takes his place, and is duly sworn and examined, as aforesaid, there being twelve jurors in the jury book at all times during these proceedings; and now both plaintiff and defendant having waived or exhausted further challenge, the jury is now constituted and is accepted by the parties

hereto as the trial jury in this cause, and the names of the jurors are as follows:

- |                    |                       |
|--------------------|-----------------------|
| 1. S. W. McDermed, | 7. F. E. Dively,      |
| 2. J. P. Cooper,   | 8. R. M. Hartley,     |
| 3. Fred Walker,    | 9. J. F. Atterberry,  |
| 4. W. M. Daykin,   | 10. J. G. Hoffsommer, |
| 5. Roy A. Corry,   | 11. F. J. Brunken,    |
| 6. B. L. Exline,   | 12. C. L. Thompson.   |

And now the jury is by the Clerk duly sworn to well and truly try the issues in this cause and a true verdict give, according to the law and the evidence.

82 By the Court: Proceed with the statement of the case on the part of the plaintiff.

By W. H. Moore: If your honor please, I suggest that the witnesses on both sides be called and sworn and put under the rule first.

Thereupon, the witnesses for both plaintiff and defendant are called and duly sworn by the Clerk of the Court; and by order of Court are required to remain outside of the court room during the progress of the trial, and not to speak with any person as to what their evidence will be before they have testified or what it has been after they have testified, excepting that they may talk to the attorneys relative thereto for either plaintiff or defendant. Thereupon, the witnesses for both plaintiff and defendant retire from the court room.

By Jno. C. Moore: If the Court please, I ask that Mrs. Turner, the widow of the deceased, be allowed to remain in the court room with the Administrator and counsel for consultation.

By W. H. Moore: We have no objection.

By the Court: Proceed with the statement to the jury on the part of the plaintiff.

83 *Plaintiff's Statement to the Jury.*

By Jno. C. Moore:

GENTLEMEN OF THE JURY: We will show to you that William L. Turner was in the employment of the defendant, the Chicago, Rock Island & Pacific Railway Company under two contracts, one which we might denominate the loading contract, and the other a cooerage contract, and that he had been under those contracts for a period of twelve years previous to his death, and under the unloading contract it was provided that he should unload the cars of coal that were set up into the chutes into the pockets so that when the engines came along they could raise the gate and the coal would slide down into the tender; that he was further required that if any of the coal fell upon the ground to gather it up and either put it on an engine or on to a car, as might be required by the Company; he was required among other things to also unload coal where the stationary engines were, that is such engines as those which ran the machinery, such as the round house; he was also required under this contract to load

cinders which were dumped into cinder pits by the engines; it seems when the engines come into town pulling a train that they ran over a cinder pit and would let the ash pan dump there, and as that filled up he was required to load those cinders to be transported and taken away; he was also required to unload cord wood for the company and put it into piles in such places as the Company designated; he was also required to unload sand for the use of engines; those things were required under the unloading contract.

Under his coopeage contract he was required to make those repairs for cars that would suit them for holding grain so as to prevent loss of grain, to stop all leakage, and it was under a particular specified condition that he was to fix a car so that it would hold grain.

There were other duties he was to perform; he was required, while it is not named in either of these contracts, but he was required from time to time, under the orders of the station agent of the company to remove freight that would come in on one car across the platform and into another car for re-transportation. The Company was accustomed to hauling in cars of coal that had been purchased by the Enid Mill and Elevator Company, by the Enid Ice and Fuel Company, or by Grubb and Purmort, by the Arctic Ice Company and various institutions here, and he had a contract with each of those institutions to unload the cars into the bins for those different institutions, so that you see his work was quite varied.

We will show you that he had been engaged in that kind of work for a long period of time; that he was preparing coal for those engines passing out of the State and through the State and that he was transferring freight from cars that passed out of the State and through the State and engaged in inter-state commerce; that he had a good many duties to perform; and that those cinders were deposited in the ash pits by the engines that he had to load to be taken away.

Among other duties named in the loading or the unloading contract, you might call it, because in one case it is loading cinders and unloading coal,—in that contract it is provided that the engineers coming in when they run to the chute for the purpose of getting coal and have obtained the coal that they want, that they shall then write upon a little ticket or card the name of the engineer, the number of the train, *the number of the train* and how much coal was taken, and they slip that into a little box there by the chute, and that little card that they put in there is called a coal ticket, and under the provisions of his contract and the manner of his work, at about five o'clock every day Mr. Turner was required to go and get those coal tickets out of that box and deliver them to the freight office of the company; it was the manner of furnishing the data to the Rock Island Railway Company as to how much of its coal had been used, and they were keeping their coal account in that way. Whenever it came around so it was necessary for a car of coal to be sent on to the chutes to be shoveled into the pockets he was required to give notice to the freight office or some of the

ices for the purpose of having more coal sent up on the chutes; the other process of taking the cards from the box at the chutes and delivering them to the freight office was commonly called among them "turning in the coal tickets."

Mr. Turner was in the service of the Company on Sunday the 28th day of July, 1912; that day being Sunday there were no switch engines running in the yards; and, indeed, on Sundays switching is not done in the yards, but trains come in and pass on, and if there is a car or something on the track that needs moving the train that passes on unhooks from some of its cars and the engine makes that car away, hooks on again and goes on.

Now, on the afternoon of that day Mr. Turner had been engaged until a little while after four o'clock in the day in loading coal that had been thrown on the ground; it seems as though the coal bins of the Enid Mill and Elevator Company were too full or something or other, and for that reason the car of coal had been thrown on the ground, and he was engaged in throwing that coal off the ground into the car during the afternoon; he had a man who was helping him at the chutes by the name of Conley and his evidence will be before you. Conley completed the unloading of the car that was set up on to the chutes, having thrown the coal into the pockets, and went to where Turner was and told him that he had unloaded all the coal; then Turner said "I must go and turn in my coal tickets and order coal for the chutes" and he started in the direction of the chutes for his coal tickets; he next appears—they saw him simply start away—he is not in sight any more through any witnesses I have knowledge of or that I presume counsel for the defendant have knowledge of, although counsel for the defendant may adduce some testimony as to his having been seen—but he next appears, I think the testimony will show, in the cream room of the ice plant, and the location of this cream room may become material in this case and I make to you a little description of it: The ice plant extends along the east side of the railroad track, east of the yard, and the north room is the bottling works room or pop room and the next room south of that is the cream room,—there is where they make the ice cream and things of that kind,—and bear in mind this was a July day, the 28th of July, the next I can call to mind now is that Mr. Turner comes into this cream room; on the east side of that room there is a door that enters out on what they call a dock that runs from the south side of this cream room past this door to the north limit of the ice plant, past the pop room; if you want to go from the cream room to the pop room you must go that way. When he left the cream room in twenty or twenty-  
87 five minutes he stepped on to this dock and then on to the ground, it being just one or two steps to the ground,—and walked north, and as he went north he came to the cinder pile of the Enid Mill and Elevator Company, which we commonly call here the "White Mill." As he came up close to it, the man in charge of it, the foreman or engineer of the White Mill, had just run a barrel of cinders up on to the cinder pile and dumped it—it was a big pile of cinders and it ran away up—and he dumped it there just as



Turner came up. And Mr. Turner was talking to that man about arranging to set this car of coal that they had been loading so it could be unloaded into the white mill, and as they were chatting the train whistled for the station of Enid. Turner took his watch out and looked at it and said "That is 24; I must go and turn in my coal tickets and order coal for the chutes," and immediately started in the direction of the freight house.

The evidence will disclose to you that there were three rows of cars standing on the three tracks in the yard there—I will describe the tracks to you, and counsel for defendant has very kindly offered me the use of the blue prints of their yards—there were three rows of cars on the tracks, and as near as we can judge—we have to present it to you so that you may judge for yourselves—after crossing the first he went down here to the next track and the train continued down the track and he went to the end of that and then went around it; that threw him where he would be further south than the point he wanted to reach, besides, two or three cars were standing on the track which compelled him to go around that way (Indicating with hands and by pointing) to the freight house for the purpose of the delivery of these coal tickets. After he had passed around the last row of cars he then crossed over—I will give you a description of the tracks—there is a track that runs along past the freight house that is called the house track, the next track is the main line track that extends from station to station, and the next is called the passing track, and you understand what that means; these three tracks, then the Company begins to number its tracks,—one, two, three, four and five, and then the last or dead track extends by the ice plant to the mill. He had passed three of those tracks in getting around the cars; he then passed over until he came to track- two and three; if you will get the location of track-two and three, you will see there is the house track, the main track, the passing track, and then one, two, three; he was, you might say, between the fifth and sixth track- where he was walking and started to walk north; the testimony of the defendant, I think, will sustain this as well as the testimony of the plaintiff, that he was walking between tracks two and three of the numbered tracks. Bear in mind a track is not a rail, it is two rails side by side that constitute a track, and the space between the tracks is perfectly safe to be upon, but on the tracks the trains run. He was walking north between tracks two and three until he had gotten to a point sufficiently far north that he thought he could cross over to go to the freight house, but 24 was coming in. "24" was a great big fine passenger train coming in on the main track, which was three tracks away from where he was when he was walking there, and it was coming in with all the noise and bluster that is incident to a splendidly equipped modern passenger train. And straight across track two, he had been to the switch yard and had seen there was no engine of cars about the switch yards, but there had come down from the State of Kansas a freight train, #95 extra, or something of that kind, and when they had gotten to the north part of the switch



yards it was necessary for them to take up a car of chickens, and they unhooked the engine, tender and box car and a flat car from the train and they ran away down there to the south end where 24 was coming in, and backed in on track two, and as 24 came rushing up that other train came rushing up; there was a great, heavy south wind blowing that carried the smoke right on the ground and entirely submerged this extra train as it came up, and when he stepped up on track two to go across it that train was coming at a great rate of speed while 24 was on the other side of this train coming rapidly up; he stepped upon that track,—and,—gentlemen of the jury, I would like to have something to make a kind of illustration to you—(Attorney secures a cane). We will suppose that to be the west rail and the other rail here (Indicating by parallel lines) he stepped onto this track to cross over; there was his right foot within the rail,—the west rail—(Indicating) he stepped his left foot over the west rail on to the ground; his face was turned in about this direction (Indicating with face and body) and he was looking directly at 24, looking directly at the passenger train 24;

90 his face was turned in that direction and this train was coming right behind him, and the brakeman—under the rules of the company the brakeman is required to be on the rear of a backing train—and the brakeman gave a keen, loud yell,—a yell that was heard clear over to the platform of the station and into the cars where the passengers were on train 24; the cars were coming very fast; and instead of changing his feet he turned this way (Indicating as if looking towards backing freight train without turning body) to see what it was; he turned to the right and that that time he was struck, not by the draw-bar, not by the bumper,—he was struck by that tube that comes out of a freight car which carries the air, the air tube struck him and threw him right down upon his face between the ties so that his head came on to the east rail and the train immediately ran over him and cut his left foot off and left it lying outside of the west rail and cut the whole top of his head off (Indicating) on the east rail so that that portion of it was thrown on the outside of the east rail and his body lay on its face. Now, we have this and it was done that way. Our evidence will disclose to you, gentlemen of the jury, that that was the way it was done. Of course, the brakeman may testify to a little difference as to position, but he will testify that he was struck down by the train. We have alleged that they ran this train, and I say to you now without using and without operating the train power brakes. I say that the evidence will disclose to you that they didn't use and operate the train power brakes, and I believe that we will convince you that that is true. I apprehend, I don't know, but I apprehend that the witnesses for defendant will swear

91 that they were used; I apprehend that their witnesses will swear that the signals were given, but—

By W. H. Moore: If the Court please, we object—

By the Court: Colonel Moore, I do not believe you are quite warranted in making that argument now.

By Jno. C. Moore: Well, I will with-draw that. But those facts, gentlemen of the jury, as I detailed them to you will be shown.

It will be shown to you, gentlemen of the jury, that he had the coal tickets for delivery and that he was going to deliver the coal tickets to the freight office, and the Court will give you an instruction as to what that means under the law. The Court will instruct you what this continued shovelling of coal for the benefit of interstate commerce means, and what that work of his in going to deliver coal tickets and to order coal for the chutes means within the law. Because, we are trying this case and are compelled to try this case here under a law of the United States and that law will govern you and govern the court and govern us all.

Now, the testimony will disclose to you that Mr. Turner was earning \$1,500.00 to \$1,600.00 and \$1,700.00 a year, and that he was expending upon his family the sum of \$1,400.00 a year. The testimony will disclose that they were using that sum or fund of money annually for the support of the family: There is the widow, and Vera and Mary and Dorothy and Willie and Bessie and Austin,—seven persons supported by the fund of money he was regularly earning, and there was no other income from any other source only the money from his labor.

92 The testimony as I say will show he was earning that sum of money and that he expended that amount upon the family; and, gentlemen of the jury, the testimony will show to you that he was 46 years of age and that he had an expectation of life of 24 years. The testimony will show you the birth, the date of birth of every child, and the Court will instruct you that these things must be taken into consideration by you in arriving at your verdict in case you find for the plaintiff.

I believe I have made the statement as fairly as I can.

By the Court: State the case to the jury on the part of the defendant.

93 *Defendant's Opening Statement to the Jury.*

By W. H. Moore:

GENTLEMEN OF THE JURY: In stating what the facts are in the case you understand we are telling you what we understand the evidence will be, and in making my statement I would rather understate than to over-state the evidence. But so that you may thoroughly understand its import I will run over it hurriedly.

There has been considerable said about these contracts, and they will cut some figure in the case, but it occurs to me you will have nothing to do with that, as they will be questions of law which the Court will have to pass on, and I think perhaps the evidence which you will have to pass on will be of small compass.

The evidence will show you that immediately prior to Mr. Turner's unfortunate death, train 24 was coming into the station headed north, an extra freight train had run into the station headed south. In some switching work they had cut the engine off with a box car and one flat car loaded with threshing machinery and were backing

that down the yards north. That put the flat car with the machinery first, then the box car, then the tender and the engine. On this flat car two brakemen were sitting, one on the right hand corner of the car, the other one somewhere else on the car, and as they came down the track going north, in the same direction 24 was going, they observed Mr. Turner walking between the two tracks in the clear. The evidence will be over-whelming that on this train its bell was ringing and the ordinary signals given, and that Mr. Turner was walking between the two tracks, perfectly in the clear, until the train with the

94 flat car was within a short distance of him; he was in a short distance of the car when he suddenly changed his course and stepped over (Indicating) like that. Immediately after that one of the brakemen on the car jumped and gave a violent stop signal and yelled at the top of his voice; the engineer caught the signal at that moment and made a remarkably quick stop, but unfortunately, the man was so close to the car that he was struck. From the allegations of the petition it is charged as one ground of negligence that the brakeman yelled at this man and that if he hadn't he would probably have gotten out of the way, but I believe when you have heard the evidence yourselves that you will see that the brakeman did whatever any man would have done under the circumstances; he yelled for the man to get out of the way and gave the stop signal immediately, and when you have heard the evidence and weigh it under the instructions of the Court I do not believe that you will be able to find that there was the slightest negligence upon the part of any one unless it be upon the part of Mr. Turner. Whether he became confused I don't know, but there was nothing done there on the part of the Company but what was proper to do.

Those tracks, as stated come, first, the house track, then the main track, then the passing track and the switches; those are made for the purpose of operating trains upon.

The evidence will show that Mr. Turner has been about the yards for years; he knows as every railroad man knows, the danger of going on a track, and simply for the moment he forgot his location and that brought about this terrible accident.

95 When you come to sift the evidence I believe you will be forced to believe that the defendant is not guilty of negligence. The Court will instruct you that before the plaintiff can recover it must be shown that he was not only killed, but it must be through some negligence of the railroad company, and if we show these things we will expect a verdict for the railroad company.

Thereupon, the plaintiff, to maintain the issues upon his part, offered and introduced the following evidence, viz:

96 W. B. PENNIMAN, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of plaintiff, testified as follows, viz:

Direct examination.

By Col. Jno. C. Moore:

Q. State your name?

By the Witness:

A. W. B. Penniman.

Q. Where do you live?

A. 902 West Cherokee.

By W. H. Moore: The defendant objects to the introduction of any evidence in this case for the reason that the allegations of the petition are not sufficient to entitle the plaintiff to a verdict against the defendant.

By the Court: Objection over-ruled.

By W. H. Moore: Defendant excepts.

By Col. Jno. C. Moore:

Q. What is your occupation?

By the witness:

A. I am a funeral director and embalmer.

Q. I will ask you if as such you were called to take charge of the body of William L. Turner on the 28th day of July, 1912?

A. Yes, sir.

Q. Where did you find the body?

A. I found it in the yards of the Rock Island Railway Company near the depot in the City of Enid.

97 Q. Can you remember about what track it was on if it was upon a track?

A. Yes, sir, I believe I could go to the place; it would be difficult to describe the location, however.

Q. Do you know what is called the house track?

A. Yes, sir.

Q. Do you know what is called the main track?

A. Yes, sir.

Q. And you know what is called the passing track?

A. Well, I don't know that I do, possibly so; I think that would possibly be the next track.

Q. Then do you know where track No. 1 was?

A. Well, I don't know that I would be safe in testifying to that; I presume it would be the next track further on.

Q. And then track No. 2 further on?

A. And so on numerically.

Q. In reference to the tracks I have mentioned, where would you say the body was, on which track?

A. I will say the body was between the rails of track one or two.

Q. What position was the body lying in?

A. Do you mean with reference to the tracks?

Q. No, sir, with reference to how it lay, which side?

A. The body lay on its face.

Q. Where did the head lie?

A. The head was east.

Q. How far to the east?

A. Just inside the east rail.

By W. H. Moore: The defendant will object to this testimony until it is shown that this was the condition of the body immediately after the accident.

98 By Col. Jno. C. Moore: I think we will connect this up.

By Col. Jno. C. Moore:

Q. Do you know how long after he had been killed that you were there, Mr. Penniman?

By the Witness:

A. No, not exactly, but not long; just a little while.

Q. There was others there?

A. Yes, sir.

Q. Did you notice Mr. Smith, who was acting as Coroner, there?

A. Mr. Smith came after I did.

Q. You were not immediately the first to the body, were you?

A. No, sir, there were others there.

Q. Did the body have the appearance of having been touched or moved by anybody?

A. No, sir.

Q. It seemed to have been in the position in which it fell?

A. Yes, sir.

By W. H. Moore: We object; that is calling for a conclusion.

By the Court: I don't think this is very material. The position of it is incompetent unless it is shown that is the position immediately after the car or train passed over. Proceed. This testimony will be admitted now and will be ruled out if it is not shown that the condition in which he found it was the condition that it was left in after the train passed over it.

99 By Jno. C. Moore:

Q. Now, Mr. Penniman, describe the condition of the body?

By the Witness:

A. Well, the body lay east and west; I would say that any casual observer would say that the body lay east and west with the head to the east.

Q. What was the condition of the head?

A. The head had been mashed from the top of the forehead across one ear; the cranium was gone.

Q. That is what produced death is it?

A. I would assume so; yes, sir.

Q. Did you notice about any other part of the body?

A. His foot had been amputated.

Q. Where was it?

A. The amputated foot was outside of the other rail on the west.

Q. Where was his right foot as near as you can remember?

A. Well, the right foot had been uninjured and was on the inside of the west rail.

Q. Did you finally take up the body from where it was?

A. Yes.

Q. I will ask you if before you did that or while doing so whether there was any smear of blood upon the rail?

A. I think there was some evidence of blood, an ear and some particles of skull gone and scattered there.

Q. State about how far outside the west rail lay the foot?

A. Well, just right close up near where it was cut off.

Q. How was the body dressed?

A. Dressed in ordinary work clothes.

Q. Can you state what kind of garments he had on?

A. He was dressed with blue over-alls, with a common work shirt, such as workmen usually wear.

100 Q. What was his condition as to being sweaty or dry and clean?

A. Well, he had been at work; his clothes were still dirty and wet with sweat.

Q. Did you take up the body?

A. Yes, sir.

Q. Did you dress it?

A. I took the body to my parlors and washed and embalmed him.

Q. I will ask you if you saw any marks or bruises upon the body in addition to what you have detailed?

A. Yes, sir, there was several abrasions and contusions on the elbows and arms.

Q. Did you observe any on the right side?

A. Yes, sir, there was an abrasion on the right side.

Q. Explain that?

A. There was a contusion on the side along about the floating ribs, a little back of the meridian line.

Q. What was its appearance as to discoloration?

A. Well, there was some discoloration.

Q. How long have you been engaged in your present occupation?

A. Fifteen years.

Q. There is literature that belongs to it as literature is there not?

A. Yes.

Q. And you are familiar with that literature?

A. Fairly so I think.

Q. And you are familiar with handling bodies that have met death by violence?

A. I have handled a great many, yes, sir.

101 Q. Could you tell from the appearance of the bruise that you speak about on the right side whether it was made before or after the pulse had ceased to beat?

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: Over-ruled.

By W. H. Moore: "Exception."

By the Witness:

A. Yes, sir.

By Jno. C. Moore:

Q. Now, you may state from your knowledge of the books and from your experience whether that bruise was made before or after the blood ceased to pulse?

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: How do you claim that to be material, Colonel?

By Col. Jno. C. Moore: If that bruise had been struck a long time before death it would be very black——

By the Court: But how is it material whether it was struck before or afterwards?

By Col. Jno. C. Moore: It is one of the most material things almost in our testimony. If he turned that way in response to that call of the brakeman and it was done by the car striking him, it shows that he did turn that way. I don't like to expose my theories at this time, but it would show his position——

By W. H. Moore: I will with-draw my objection and let the question be answered.

102 (Here, at the request of counsel, the last question above was by the Reporter read to the witness, viz: "Now, you may state from your knowledge of the books and from your experience whether that bruise was made before or after the blood ceased to pulse?"

By the Witness:

A. It was made before.

By Col. Jno. C. Moore:

Q. Can you tell from it whether it was any considerable period before?

A. It was a very short time.

Q. Mr. Penniman, did you find any other object there except his foot, any object that he had about his person?

A. Yes, sir, I picked up some other things.

Q. What were they?

A. A hat, pipe, and his watch was taken out of his pocket.

Q. What did you do with the pipe?

A. I think I gave that to some member of the family, possibly Mrs. Turner.

Q. I will ask you what was the condition of the stem of it, if you can remember?

A. The stem was broken right close to the mouth piece.



Q. And in that condition you gave it to Mrs. Turner?

A. Yes, sir.

Q. Did you have the remainder of the stem?

A. No, sir.

Q. At the time you were at the body how far from it were the cars standing on the same track?

A. I don't know; not far.

103 Q. Which way?

A. Well, there was cars both ways I think.

Q. On the same track?

A. I believe so.

Q. What did you see to the north of you?

A. There was an engine and a flat car, I think, on the north side, and it looked like the train had been cut in two, but I am not positive about that.

Q. How far away from the body was the engine?

A. I should think it was further than from here to the windows yonder (Indicating from north to south end of court room. Being about 60 feet to 75 feet.) may be it was twice that distance. (Being about 130 or 140 feet.)

Q. Was it standing next to the body or was there some other car between?

A. I don't know.

Q. You cannot remember?

A. No, I didn't pay much attention to that part of it.

Q. I will ask you if you remember about the wind that day, the state of the weather?

A. Well, it was hot and blustery, and windy.

By Jno. C. Moore: "That is all."

Cross-examination.

By W. H. Moore:

Q. What time of day was it that you went down there?

By the Witness:

A. I believe it was about six o'clock.

Q. It was broad day-light yet?

A. Yes, sir.

104 Q. You went there for the purpose of taking care of the body?

A. Yes, sir.

Q. Did you make any special inspection to see where the cars were, what the situation was there?

A. No, that was an immaterial part of my errand.

Q. And the statement you make now about the distance of that car or whether the engine or the flat car was next to the body is simply an impression you had over a year ago?

A. Yes, sir.

Q. You would not undertake to say positively about those things? whether the engine, the tender or a flat car was next to the body?



A. No, sir, I would not undertake to testify positively about that.

By W. H. Moore: That is all.

Witness excused.

105 E. F. SMITH, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Col. Jno. C. Moore:

Q. State your name?

By the Witness:

A. E. F. Smith.

Q. Where do you live?

A. Enid.

Q. What is your occupation?

A. Attorney at law.

Q. And a Justice of the Peace?

A. Yes, sir.

Q. I will ask you if you were called as Coroner on the 28th of July, 1912, in regard to the body of William L. Turner, deceased?

A. Yes, sir.

Q. Where did you go?

A. I went down to the Rock Island switch yards.

Q. Can you remember what track it was?

A. I think it was four or five tracks over from the freight office, probably about the third switch track.

Q. Had anybody been there before you?

A. Yes, there was quite a crowd gathered there before I got there.

Q. In what position was the body lying?

A. Between the rails on one of the switch tracks, I think the fourth or fifth track from the freight house, almost due east of the north end of the freight house, as near as I can recollect.

106 Q. Which way was the head?

A. The head was pointing to the east.

Q. And the feet?

A. To the west.

Q. What was the condition of the head?

A. The head was mutilated, the top was taken off.

Q. By which rail?

A. The east rail.

Q. Where were his feet?

A. One foot was drawn up a little inside of the rail; the other one was on the outside severed from the body.

Q. Can you remember which foot was severed?

A. No, I cannot. I think it was the left foot; I will not be positive though.

Q. Did you make any particular examination of the body?

A. Oh, just in a general way; I didn't make any physical examination of the body or clothing.

Q. What was the condition of the clothing?

A. A little bit disarranged, like they ordinarily would be.

Q. On which side did the body lie?

A. The body lay face downward.

Q. I will ask you if you noticed what kind of garments he was wearing?

A. He had on what I would call—I don't think they were overalls, they were just every day clothes and an every day work shirt, if I remember right.

Q. Did you see any other objects lying there besides his foot, that he had possibly had about his person?

A. I don't recall any now; oh, you mean besides his foot.

Q. Yes, any objects lying there that he might have had about his person?

A. Nothing only parts of the body that I can recollect now.

107 Q. I will ask you if you made an investigation as Coroner into the causes of his death?

A. No, not as Coroner; that is, I didn't hold what you call an inquest; but I was there as Coroner, yes, sir.

Q. You had some witnesses sworn did you not?

A. I did for the purpose of testifying to find out whether it was necessary or advisable to hold an inquest over the body.

Q. Can you remember how many witnesses you had sworn?

A. Four or five.

By W. H. Moore: The defendant objects to going into this.

By the Court: Sustained.

By Jno. C. Moore: That is all. You may take the witness.

Cross-examination:

By W. H. Moore: You may stand aside.

Witness excused.

108 W. M. HUTCHINSON, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the Plaintiff, testified as follows, to-wit:

Direct examination.

By Col. Jno. C. Moore:

Q. State your name?

By the Witness:

A. W. M. Hutchinson.

Q. Where do you live?

A. I live in the country here now.

Q. Were you acquainted with William L. Turner during his life time?

A. Yes, sir.

Q. How long had you known him?

A. About eight years.

Q. Did you see him on the 28th day of July, 1912, the date of his death?

A. Yes, sir.

Q. About how long before he died?

A. About ten minutes.

Q. What were you doing at the time?

A. I was firing at the white mill at that time.

Q. At what particular place were you when you saw him first?

A. I was on the cinder pile when I was talking with him.

Q. At about what hour of the day?

A. It was about 5:25 o'clock.

Q. In the morning or evening?

A. In the evening.

Q. What were you doing on the cinder pile?

A. I was hauling cinders from the boiler room.

Q. Where was he?

A. He was coming from the ice plant when I first discovered him.

109 Q. From which part of the ice plant?

A. When I saw him he was about twenty feet south of the door coming towards me.

Q. Called the cream room?

A. Yes, sir.

Q. What did he say to you when he came up, if anything?

By W. H. Moore: The defendant objects as incompetent, irrelevant and immaterial.

By the Court: How do you claim that to be material, Colonel?

By Jno. C. Moore: It is part of the *res jacte*.

By the Court: I think it is stretching the *res jacte* a little.

By Jno. C. Moore: It was the view of Judge Cottrell that it was *res jacte* when we had the matter before him on removal.

By the Court: But you were not trying the merits of the case in the United States Court.

By Jno. C. Moore: Well, it involved *res jacte*—

By the Court: I will sustain the objection now; and if you have an authority on that I will be glad to hear it; I do not understand that *res jacte* ordinarily takes place that far ahead; *res jacte* as I understand, is what was said and done at the time and immediately prior to the occurrence.

By Jno. C. Moore: Or connected with the occurrence.

By the Court: "Objection sustained at this time."

By Jno. C. Moore: "Exception".

110 By Jno. C. Moore:

Q. What did he do while you were conversing there, while you were on top of the cinder pile?

By the Witness:

A. He walked up and spoke to me. He lit his pipe, and about

that time he heard a train whistle and he pulled out his watch and says,——

By W. H. Moore: Never mind what he said.

By the Court: Just state what he did, not what he said.

By the Witness:

A. Well, he lit his pipe and turned around and walked away.

By the Court:

Q. When he pulled his watch out what did he do?

A. He said——

Q. What did he do; did he look at it?

A. Yes, sir.

Q. Then what did he do?

A. He put his watch in his pocket.

Q. Then what did he do?

A. He turned around and walked away west.

By Jno. C. Moore:

Q. In what direction?

By the Witness:

A. Between the boiler room and the elevator.

Q. I will ask you if that would be in the direction of the freight house?

A. Yes, sir.

Q. I will ask you this: I will ask you if when he pulled out his watch when 24 whistled in, when he pulled out his watch and looked at it if he said to you: "There is 24; I must go and turn in my coal tickets and order coal for the chutes"?

111 A. Yes, sir.

By W. H. Moore: We wish to object to that and ask the Court to instruct counsel not to ask questions of that kind after they have been ruled out by the Court; it is highly improper and prejudicial.

By the Court: Yes, the answer will be stricken out and the jury is instructed not to consider it.

By Col. Jno. C. Moore: The plaintiff now offers to prove by this witness that the deceased Turner when he heard the train coming in——

By W. H. Moore: I think this ought to be dictated to the Stenographer and not in the hearing of the jury.

By the Court: Well, it should not be stated in the hearing of the jury.

By Col. Jno. C. Moore (In low tones to Reporter: I want to make this offer: Plaintiff offers to prove by this witness that when the deceased heard the train whistle he took out his watch and looked at it and said "That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes."

By W. H. Moore: To which offer the defendant objects.

By the Court: The objection will be sustained.

By Jno. C. Moore: Plaintiff excepts.  
By the Court: "Exception allowed."

112 By Jno. C. Moore:

Q. Now, Mr. Hutchinson, which way did he go?

By the Witness:

A. He started towards the freight depot.

Q. Do you know what his business was in going towards the freight depot?

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: Overruled.

By W. H. Moore: Defendant excepts.

By the Witness:

A. He said he was going to order coal for the chutes——

By W. H. Moore: We ask that the answer be stricken——

By the Court: You cannot testify to what he said; don't be trying to tell that.

By Jno. C. Moore:

Q. Do you know what his business was in going towards the freight house?

By the Witness:

A. I guess his business was to take his tickets to the freight house and to order coal for——

By W. H. Moore:

Q. All you know about what his business was, is what he told you there?

A. Yes, sir.

113 By W. H. Moore: We ask that his answer be stricken from the jury as pure hear-say.

By the Court: Sustained; the answer is stricken from your consideration.

By Jno. C. Moore:

Q. Now, Mr. Hutchinson, what kind of weather was it that day?

By the Witness:

A. Well, sir, it was pretty windy.

Q. Which way was the wind?

A. From the south until about two o'clock and from that on from the south-west.

Q. I will ask you when you heard of a man being killed in the yards, if you did hear that,—did you see Mr. Turner's body in the yard?

A. Yes, sir.

Q. Where was it lying?

A. Between the tracks.

Q. What track was it?

A. I believe it was No. 5.

Q. Do you know what is called the house track?

A. Yes, sir.

Q. Do you know what is called the main track?

A. Yes, sir.

Q. Do you know what is called the passing track?

A. Yes, sir.

Q. Do you know what track No. One is?

A. Yes, sir.

Q. And track No. 2?

A. Yes, sir.

114 Q. Is track No. 2 what you call track No. 5?

By W. H. Moore: Defendant objects.

By the Court: Over-ruled.

By Mr. W. H. Moore: Defendant excepts.

By the Witness:

A. I will have to study a minute.

By Jno. C. Moore:

Q. Well, did you go to the body?

A. Yes, sir.

Q. Which way was the head lying?

A. His head was lying across the east rail.

Q. His feet, where were they?

A. One of them was across the west rail, the one that was cut off.

Q. Did you see an engine and cars standing near him?

A. I saw an engine and three cars.

Q. Which way were they fronting?

A. The engine was fronting south and backing up.

Q. Which way from him?

A. North.

Q. How far away from him?

A. I would judge about 300 feet when I got there.

Q. How long after he left you before you heard of his death?

A. It was not over ten minutes.

Q. Was it that long?

A. Well, I could not exactly say; I don't hardly think it was exactly that long.

115 Q. Was that in the direction from where he had been with you towards the freight house,—between where he had been with you and the freight house,—was it between the cinder pile and the freight house?

A. No, sir.

Q. Wasn't that in the direction of the freight house?

A. Yes, sir.

By W. H. Moore: We object as leading.

By the Court: "Over-ruled."

By W. H. Moore: "Defendant excepts."

By Jno. C. Moore:

Q. Which direction was it from the cinder pile to where the body lay?

By the Witness:

A. Well, sir, it was south from the cinder pile, rather south and west.

Q. I will ask you in going from the white mill to where the body lay if you had to pass around or through any cars?

A. Yes, sir.

Q. State to the jury what you did do; state how you went in going to the body?

A. I went out of the boiler room door between the elevator and the coal bin and then went south and I jumped over a string of cars and went a little further and I jumped over another string and then went down a little further and jumped over another string of cars and went down the track to where he was lying.

Q. Were you there in sight of the body?

A. Yes, sir.

116 Q. Did you see any object lying on the ground there that belonged to Mr. Turner?

A. I saw his hat and I saw his pipe.

Q. Had anybody touched the body that you know of?

A. No, sir, I think not.

Q. How many persons were there by that time?

A. Well, there was about a half dozen.

Q. Are you acquainted with passenger train No. 24?

A. Yes, sir, I am well acquainted with it.

Q. I will ask you if passenger train No. 24 was in sight when you got to the body of Mr. Turner?

A. "24" was at the depot.

Q. You saw it then, did you?

A. I saw it there.

Q. How long had it been there in your opinion, if you know?

A. It hadn't been there over three or four minutes.

Q. You heard it coming in, did you?

A. Yes, sir.

Q. Did you hear "24" whistle?

A. I heard "24" whistle for the town, yes, sir.

Q. And at the time 24 whistled William Turner was standing talking to you was he not?

A. Yes, sir.

Q. And when you got to his body, "24" had reached the station?

A. Yes, sir.

Q. Tell the jury how much work you had done after Turner left you before you heard of his death?

By W. H. Moore: Defendant objects as immaterial.

By the Court: "Over-ruled."

By W. H. Moore: "Exception."



117 By the Witness:

A. I walked from the cinder pile back into the boiler room and loaded up a load of cinders.

By Jno. C. Moore:

Q. That was all you had done before you heard of his death?

A. Yes, sir.

Q. How long did it take you from the time you left the boiler room until you got to the body?

A. It didn't take me over about five minutes.

By Jno. C. Moore: That is all; you may cross-examine.

Cross-examination.

By W. H. Moore:

Q. What mill were you working for?

By the Witness:

A. The white mill.

Q. The Enid Mill and Elevator Company?

A. Yes, sir.

Q. Their plant is about opposite the passenger depot?

A. Yes, sir.

Q. How far was it south to where Mr. Turner's body lay from the boiler room?

A. I don't really have any idea.

Q. You have a better idea than the jury, you have been over it; how far do you think it would be; what is your best judgment of the distance?

A. Well, I would judge from the mill to where Mr. Turner was laying I would judge it was about 700 feet, may be a little further, just guessing at it.

118 Q. Do you recollect who told you of Mr. Turner's death, how you got the information?

A. Mr. Longworth, a car worker for the Rock Island told me.

Q. He had been down there to where Mr. Turner was?

A. I judge he had.

Q. Then you went down there?

A. I went right down there.

Q. In going down there you had to crawl over three strings of cars?

A. Yes, sir.

Q. Would you go up the side ladder?

A. I went between the cars and jumped through the bumpers.

Q. Mr. Longworth in coming to the mill had to come the same way?

A. I don't know; I never paid any attention to that.

Q. Do you know whether or not "24" stops and takes water before coming into the passenger depot, or did at that time?

By Jno. C. Moore: We object as not proper cross-examination.

By the Court: Over-ruled; exception allowed.

By Jno. C. Moore: "Exception."

By the Witness:

A. I don't think they took water that day.

By W. H. Moore:

Q. You said you were well acquainted with "24"; was it not the practice to take water there before going to the station?

A. I have seen them take water there and not take water.

Q. Which was the practice in your experience?

A. I think they took water more times than they didn't take water.

119 Q. But you think they didn't take water this day?

A. I don't think they did.

Q. What makes you think that?

A. They were not taking water when I went by there.

Q. They were at the station then?

A. Yes, sir.

Q. What makes you tell the jury that you don't think they took water there that day?

A. I don't think they did.

Q. Why don't you think it, what do you base that on?

A. I have no object for that at all only I heard some of them say they didn't take water.

Q. Who did you hear say that?

A. Some people down there; I never asked them their names.

By W. H. Moore: That is all.

Witness excused.

120 GEORGE H. McBLAIR, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. George H. McBlair.

Q. Where do you live?

A. I live out in the steel plant addition to Enid.

Q. Did you see William L. Turner on the day that he was killed?

A. Yes, sir.

Q. Where were you standing?

A. I was standing in ten or fifteen feet of the water-spout at the south end of the depot platform.

Q. Where was train 24 at that time?

A. It just had come in.

Q. Had it stopped?

A. It had hardly stopped.

Q. Where was Mr. Turner?

A. The first I noticed of him he was just starting across the track.

Q. What track?

A. Well, there is nine tracks there, and it was the center track.

Q. In the center track of the nine?

A. Yes, sir.

Q. And did you see a train coming towards him?

A. Yes, sir.

Q. When he stepped upon the track how far away was that train from him?

A. It was not over about fifty or seventy-five feet, I think, when he first started to cross.

Q. Which way was he walking?

121 Word "West" Inserted by me.

W. R. LICEMPTE.

A. North-west.

Q. Crossing the track like?

A. Yes, sir.

Q. I will ask you how he was stepping, whether promptly or slowly?

A. He was just walking moderate like.

Q. Did he seem to notice the cars coming behind him?

A. No, sir, he was watching "24".

Q. Which direction from him was 24?

A. North.

Q. Any west?

A. Yes, some west.

Q. But mostly north?

A. Yes, sir.

Q. Which way was this train coming on the track he was on?

A. It was backing in from the south.

Q. Did you notice any persons on that train as it was backing up?

A. One.

Q. What did he do?

A. He hallowed when they were approaching Mr. Turner.

Q. How close were they to him when he hallowed?

A. They were, I suppose, about twenty or twenty-five feet when he first hallowed.

Q. When they got closer to Turner how had Turner stepped?  
west

A. He had stepped his left foot over the <sup>^</sup> rail, and when the brakeman hallowed he turned to the right looking eastward, the train then hit him and drew him down.

Q. I will ask you at what rate of speed that train was running as near as you can tell?

A. I judge twenty or twenty-five miles an hour.

Q. Coming in very fast?

A. Yes, sir.

122 Q. I will ask you if the train had been running slowly at the time the brakeman hallowed if they would have struck him?

is, a citizen of the State of Oklahoma, within the Western District of the State of Oklahoma; that the Chicago, Rock Island and Pacific Railway Company, the defendant herein, was at the time of the institution of this suit, ever since has been and now is a corporation organized under and by virtue of the laws of the State of Illinois and Iowa, with its principal place of business at the City of Chicago, in said State of Illinois, and was at the time of the commencement of this suit, ever since has been and still is a non resident and non-citizen of the State of Oklahoma.

Fourth. Your petitioner shows to this Honorable Court that this is a suit of a civil nature and that the amount in controversy in this cause exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, and that the controversy herein is between citizens of different states.

Fifth. Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, conditioned that it will, within thirty days from filing this petition, enter in the District Court of the United States for the Western District of the State of Oklahoma a certified copy of the record in this suit and for the payment of all costs that may be awarded against it by the said United States District Court if said United States District Court shall hold that said suit was wrongfully or improperly removed thereto.

Sixth. Your petitioner further states that notice of the filing of this petition and of the bond herein, has been duly served upon the opposing party as required by law.

Seventh. Your petitioner further avers that the said William L. Turner, deceased, for whose death this suit is brought, was not at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the States, or engaged in interstate commerce.

Eighth. Your petitioner further prays this court proceed no further herein except to make the order for removal as required by law and to accept the bond presented herewith and direct a certified copy of the record in this suit to be made for said court as provided by law, and as in duty bound your petitioner will ever pray.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,

By C. O. BLAKE,

H. B. LOW,

R. J. ROBERTS,

W. H. MOORE,

J. G. GAMBLE AND

ROBERTS & CURRAN.

STATE OF OKLAHOMA,

County of Garfield, ss:

I, J. G. Gamble, of lawful age, being first duly sworn, upon my oath depose and say: That I am an agent and attorney of the above named defendant, The Chicago, Rock Island and Pacific Railway Company, and as such authorized to make this affidavit for and on

behalf of said petitioner; that said defendant, The Chicago, Rock Island and Pacific Railway Company is a foreign corporation and not a resident of the State of Oklahoma, and that there is no managing officer of said defendant in Garfield County, in said State; that I have read the above and foregoing petition for removal and the facts stated therein are true as I verily believe; further affiant sayeth not.

J. G. GAMBLE.

Subscribed and sworn to before me this 24 day of June, 1913.

GEO. M. SCIFRES,  
*Clerk Dist. Court.*

My commission expires —.

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## EXHIBIT B.

Be it Remembered, That heretofore, to wit: on Thursday September 18th A. D., 1913, the same being a day of the special Guthrie Term, 1913, of the District Court of the United States for the Western District of Oklahoma, the following proceedings, among others, were had by said United States District Court, Honorable John H. Cotteral, presiding, as appears of record in my office:

No. 1174.

"A. P. BOND, Administrator, Plaintiff,

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a  
Corporation, Defendant.

Now on this 18 day of September, 1913, this cause comes on for further hearing upon the motion of plaintiff to remand the cause to the District Court of Garfield County, Oklahoma. The plaintiff is present by his attorney, John C. Moore, Esq., and the defendant is present by its attorney, J. G. Gamble, Esq., Thereupon the court now being fully advised in the premises, it is ordered that said motion to remand be, and the same is sustained, and that this cause be, and the same is hereby remanded to the District Court of Garfield County, Oklahoma, at the cost of the defendant, To which order and ruling the defendant duly excepts."

28 UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss:*

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District Court of Oklahoma, do hereby certify the attached to be a full, true and complete copy of original order remanding the case of A. P. Bond, Administrator, plaintiff, vs. The Chicago, Rock Island and Pacific Railway Company, a corporation, defendant, No. 1174, in this court, to the District Court of Garfield County, Oklahoma, as the same appears in the record

the burden of proof is upon the plaintiff to that extent. As I recall it, the evidence does not disclose what was the object in him going over there to the white mill or what he was doing there. There is proof that the custom was to take the tickets from the boxes and to deliver them to the clerk at the freight office; the statement made by him and admitted in evidence characterising and explaining his reason for crossing the tracks, I fear would hardly be such as to warrant a court in saying that was evidence of being engaged in inter-state commerce at the time; it is very close upon that, but it would be a question for the jury; there is under all the circumstances things upon which an inference could be drawn, and that is, he was engaged in unloading coal into the chutes and from the chutes to the pockets and from the pockets to the tenders of engines engaged in inter-state commerce and that in delivering the tickets he would go to the freight office, and, there is a contract in evidence showing that he was also engaged in cooping cars for the Company. Now what he went to the white mill for, as far as I recall the evidence does not disclose clearly.

260 By W. H. Moore: The evidence shows that to get those tickets he had to go to the coal chutes and carry them to the freight house, and there is no evidence that he had been to the coal chutes; they were still there——

By the Court: That is, some of them were there.

By W. H. Moore: The evidence is that the tickets were turned in at one time; he was going away from the coal chutes going north at the freight depot; the evidence is he was coming from the white mill and not the coal chutes; the evidence is that he had an unloading contract with the white mill and the Ice Company and others, and there is as much ground to suppose he was engaged in something for them as there is to say he was working for the Railroad Company; nobody said any coal tickets were on him; nobody said any tickets blew away from there; the evidence is that the tickets were still in the box, by Mr. Bond, his partner, and by the agent; what reason is there to suppose he made two trips down there and left some of the tickets to be brought up later.

By Jno. C. Moore: I didn't care to say anything unless the Court wants me to say so now.

By the Court: I want to hear from you now as to what evidence there is outside of that declaration of his on that point; and the declaration itself I fear cannot be taken as evidence of that particular fact; it can be taken as evidence to show he was not a trespasser.

261 By John C. Moore: In the first place, there are some rules of construction to govern the Court; one of them is in the case of Berrin (?) vs. The Illinois Central Railway Company, and the Mondue (?) cases, 223, U. S., page One, which constitute the great controlling cases where the Supreme Court of the United States lays down the rule; and they have followed that in the Berrins case in the Federal Court——

By the Court: They decide it will be liberally construed.

By Jno. C. Moore: As liberally and as broadly as possible, is the language; not merely liberally.

By the Court: If there was not any evidence that he had been engaged in doing work for the white mill and the Ice Company, I think it would be a fair inference that his trip over there would be by virtue of his employment with the Railroad Company—

By John C. Moore: Mr. Conway gives the hour of the day in his deposition when Mr. Turner started upon that work; he says 'not long after four o'clock.' Conway says he came from the chutes,—and he was the helper.—he came from the chutes to the coal pile and informed Turner that the coal was all out and that Turner immediately started in the direction of the coal chutes. Your honor excluded the other testimony of Mr. Conway where he said that Turner said he must go and get his tickets and turn them in and order a car of coal for morning, but there is the going to the coal chutes again.

262 Now, the next time he is seen is at the White Mill, and inasmuch as the Court has admitted the whole statement I think we ought to be entitled to use it; at the white mill he said to the man on the cinder pile when he heard "24" whistle for the station "That is 24; I must go and turn in my coal tickets and order coal for the chutes," and immediately started towards the freight house. One witness stated his custom was to turn his coal tickets in between five and six o'clock; the Clerk said he turned them in usually between four and six o'clock, and that he turned them in at the freight house. Now, with that in view, and under the rules of construction, this should go to the jury; and, he was continually shoveling coal for inter-state commerce.

By the Court: I don't think there can be any question of that; but he was engaged in unloading coal for the White Mill, the Ice Company and also for Grubb and Purmourt; now he goes right up to the white mill—

By John C. Moore: Yes. And now he hears "24" coming in; and now begins the *res gestæ* of the transaction; right at that time comes to his mind; "I must turn in my coal tickets; that is "24"; and order coal for the chutes." The testimony of George Bond shows that they were accustomed to taking about 75 tons of coal a day and that the average of the coal taken was five tons to the engine; five tons to the engine and 75 tons per day was fifteen engines

263 in 24 hours. Now he says there was as many as two tickets in the box, and the other man says Turner turned in no tickets; he does not say how many he got, but one witness says there was two tickets in the box. This must have been before the Chief Clerk went down there to get the tickets, and here is a discrepancy of thirteen tickets. How will we explain that? Those tickets are documents of the railroad company—

By the Court: I don't consider that there is that discrepancy. He simply says he found two tickets in one box and didn't look in the other box; the other thirteen may have been in the other box. You didn't ask the other man how many he got—

By John C. Moore: As I remember he said he got a few tickets.



By the Court: However, I will over-rule the demurrer and give the defendant an exception.

By Mr. Curran: I would first like for the Court to let me present some authorities. Here is a case that construes the Mondue case.

By the Court: Let me see that. I will over-rule the demurrer and let the defendant introduce its evidence, and if there is not anything that shows up about his duties at that time, I can save the point by a per-emptory instruction. The demurrer will be over-ruled and an exception allowed.

By W. H. Moore: The defendant excepts.

By the Court:

Thereupon, by order of court, the jury sworn to try this cause comes into open court in a body, and it is admitted by counsel for plaintiff and defendant that all the jurors are present.

264 Thereupon, the defendant, to maintain the issues upon its part, offered and introduced the following evidence, viz:

G. H. PASH, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name.

By the Witness:

A. G. H. Pash.

Q. Where do you live?

A. El Reno, Oklahoma.

Q. What is your business?

A. Civil Engineer.

Q. By whom are you employed?

A. The Rock Island.

Q. How long have you been employed by the Rock Island?

A. Since September, 1905.

Q. How long have you been a civil engineer?

A. Since 1902.

Q. I will ask you if you had occasion to make a blue print of the Enid yards from Market Street to the engine house?

A. I did.

Q. Look at the paper I now hand you and state whether that is the blue print made by you or under your direction?

A. Yes, sir.

Blue Print of Rock Island yards at Enid, Oklahoma, so identified by the witness, is by the Reporter marked as Exhibit One.

265 Q. In a general way, what does this blue print show?

By John C. Moore: We object: if you want to introduce it, you may.

By W. H. Moore: Very well. Defendant offers in evidence Exhibit One identified by the witness.

By John C. Moore:

Q. Did you personally make this blue print?

By the Witness:

A. I did.

Q. Did you personally make the original diagrams from which it is printed?

A. I corrected the original.

Q. Did you personally make the measurements that are given here?

A. I did. I took every measurement and made new ones.

By John C. Moore: There is no objection to Exhibit One.

Which said Exhibit One, so identified and offered in evidence without objection, is in the words and figures following, viz:

(Here follows diagram marked page 266.)

MAP

TOO

LARGE

FOR

FILMING

267 By W. H. Moore:

Q. Mr. Pash, please locate the passenger depot on this blue print?

By the Witness:

A. The passenger depot is between Market and State Streets.

Q. How is it marked on the plat?

A. It is marked "Depot."

Q. Immediately opposite the passenger depot, how many tracks are there and what are the names of them?

A. There are five tracks, just east of the depot.

Q. What are they, beginning with the depot?

A. The main line, the passing track, and yard tracks One, Two and Three.

Q. Coming down to the cinder platform to the end of the platform marked "Cinders" what is there there? I am inquiring about the water crane to the tank?

A. We have a water crane and tank located there at the south end of the platform.

Q. Is that water crane shown on the blue print?

A. Yes, sir, it is.

Q. In what way?

A. It is shown with a dot marked "Water crane."

Q. With relation to the crane, where is the tank?

A. The tank is about 100 feet south-westerly from the crane.

Q. Is this map drawn to a scale?

A. It is.

Q. What is it?

A. One hundred feet to the inch.

Q. Will you verify that distance from the crane to the water tank and see what the distance is?

268 By John C. Moore: We object as surplusage.

By the Court: "Over-ruled."

By W. H. Moore: "I will withdraw it."

By W. H. Moore:

Q. Where is the freight depot as shown on this plat?

By the Witness:

A. The freight depot is south between York and Wabash Streets, and marked "Freight House."

Q. Beginning and going east from the freight house, what tracks are shown?

A. We have the freight house track, which is west of the main line, and then a passing track east, and then yard tracks One, Two, Three, Four, Five and Six.

Q. What is the distance between tracks Two and Three?

A. Thirteen feet.

Q. What is the distance between the passing track and Number One?

A. Thirteen feet.

Q. What is the difference between the main line and passing tracks

A. Fourteen feet.

Q. Between the house track and that?

A. Fourteen feet.

Q. How far from the water crane is the north end of the freight depot?

A. It is about 500 feet.

Q. How far north of the depot does the freight platform extend?

A. Fifty-two feet.

269 Q. Just south of the water-crane is a track that runs a short distance and then divides; one you have identified as the house track east of the freight house, what is the track west of the freight house?

A. That is an industrial or team track.

Q. Does this blue print show the location of the various industries on the right-of-way?

A. It does.

Q. What industry, if any, is immediately opposite the passenger depot?

A. The Enid Mill and Elevator Company.

Q. What is the next south of that?

A. The Enid Ice and Fuel Company.

Q. Then the next south of that?

A. The next south is the Texas Oil Company.

Q. Where is the Texas Oil Company with reference to the freight depot?

A. It is south-easterly.

Q. Where is the Enid Mill and Elevator Company with reference to the freight depot?

A. It is in a northeasterly direction.

Q. The Enid Ice and Fuel Company, I meant to say?

A. In a northeasterly direction.

Q. Then the freight depot is between and west of those two industries?

A. Yes, sir.

Q. Where are the coal chutes?

A. The coal chutes are south near the round house. (Indicating on Exhibit One.)

270 Q. On which side of the track are they?

A. They are immediately west of the main line track.

Q. How many pockets are there in that coal chute, do you know?

A. It is a ten pocket coal chute; five pockets on either side.

Q. Are there any other coal chutes about here in the yards at Enid except these that you have shown?

A. There are not.

Q. How far from the south of the freight depot are the coal chutes?

A. About 1550 feet south of the freight house. (Referring to Exhibit One.)

Q. That would put it some 2000 feet south of the depot?

A. About 2,000 feet south of the depot; may be a little more.

Q. It would be the length of the freight house more than that south of the depot?

A. Yes, sir.

Q. Where do these yard tracks from one to six, where is their south end; south of the freight depot?

A. South of the freight depot.

Q. How far south do the leads go off there?

A. About 900 feet south of the south end of the freight house; that is, where the passing track comes out.

Q. Then the other industrial tracks run ahead and north of that?

A. Yes, sir.

Q. Tell us how far it is from the south end of the Enid Ice and Fuel Company to the Texas Oil Company?

A. 557 feet.

Q. And from the Enid Mill now to the Texas Oil Company?

A. 868 feet.

271 By W. H. Moore: You may cross-examine.

Cross-examination.

By John C. Moore:

Q. Mr. Pash, you may state what is the distance from the south side of Market Street to the north end of the passenger depot?

By the Witness:

A. It is 113 feet.

Q. Is there any building north of the passenger depot?

A. There is not.

Q. Then the baggage room you consider as a part of the passenger depot?

A. Yes, sir.

Q. What is the length of the passenger depot?

A. 158 feet.

Q. Is there a brick platform that extends in front of the depot from Market Street farther than the depot itself?

A. There is.

Q. What is the entire length of that brick platform from Market Street south to its terminus?

A. 457 feet.

Q. Is there south of that brick platform an additional platform covered with cinders?

A. There is.

Q. What is the length of that north and south?

A. That is 83 feet.

Q. At what portion of that cinder platform is located this water-spout?

A. It is about twenty feet south of the north end of the cinder platform, or south of the brick platform.

272 Q. Taking the distance from the watering spout south to the north end of the platform of the freight depot, what is the distance south?

A. 415 feet. (Referring to Exhibit One.)

Q. What is the distance and the direction of the north side of the freight house from the south side of the Enid Mill and Elevator Company?

A. It is south-westerly.

Q. And a distance of about what?

A. Of about 600 feet.

Q. What is the distance from the Enid Mill and Elevator Company to the north line of the Enid Ice and Fuel Company?

A. Eighty-six feet.

Q. What is the direction and the distance from the north side of the Enid Ice and Fuel Company to the north end of the platform of the freight house?

A. It is about 500 feet.

Q. You may give the direction?

A. The freight house being about 500 feet southwesterly.

Q. I will ask you if there is a track that comes to the main line down near the coal chutes on the south which is called locally the lead?

A. It is really a turn out to the scale and stock yards track.

Q. Is there not a track that leaves the main track which runs in a northerly direction from the neighborhood of the coal chutes?

A. There is.

Q. What is that track called?

A. Well, we have a freight house track leading out on the west to the passing track lead to the yard tracks on the east of the main line.

273 Q. The passing track leads to the yard tracks?

A. Yes, sir.

Q. That is the one that is called the lead?

A. It would be called the south lead to the yard.

Q. I will ask you if the several switching tracks converge into that track before it reaches the main line?

A. There would be one; that is, the lead track would come into that passing track.

Q. Then the other tracks, the switching tracks 1, 2, 3, 4, 5 and 6 would connect with this lead track would they?

A. They would.

Q. When you leave the main line, in order to take those tracks do you first pass upon this lead?

A. You do.

Q. And then as you wish to go on another track you go up that lead until you reach the switch that puts you on to another track?

A. Yes, sir.

Q. Will you state to the jury where the switch is that allows track two to leave the lead with reference to the location of the coal chutes,—the distance from the coal chutes to that switch?

A. 986 feet northerly from the coal chutes would be the point at which track two would leave the lead track.

Q. And track two extends no farther south than where it connects to the lead?

A. No, sir.



Q. In order to leave the main line and get on to track two, how many switches must be opened or closed to let the train go over on to track two?

A. There would be the main line switch and the switch to track two. Two switches.

274 Q. Is that true now of all the other numbered tracks in the yards?

A. I don't believe I understand the question.

Q. I say is that true of all the other numbered tracks in the yards, that is, two switches?

A. Yes, sir, there would be two switches.

Q. I will ask you if the passing track is the same track as you call the lead?

A. The passing track is, yes.

Q. Does the house track extend south of the freight depot?

A. It does.

Q. I will ask you if there is a platform on the east side of the freight house?

A. There is.

Q. What is its width?

A. Twelve feet.

Q. How long is the freight house itself?

A. 224 feet.

Q. Does this platform extend farther south than the south end of the freight house?

A. It does.

Q. How much farther south?

A. 311 feet.

Q. What is the full length of the platform by the side of the freight house?

A. South of the freight house the platform is twenty feet in width and along the east line of the freight house is twelve feet in width.

Q. I want the entire length of the platform, please?

A. 587 feet.

275 Q. Now, from the south end of that platform to the coal chutes south, how far is it?

A. 1323 feet.

Q. What is the distance, then, from Market Street to the coal chutes?

A. 2804 feet.

Q. What is the distance from the east side of the platform of the freight house to the east side of track Six?

A. Do you mean to the east rail of Track Six or the center of Track Six?

Q. I used the words 'east side of track six'; it will include the rail anyway and it might include the ties. Well, testify to the east rail of track six?

A. It would be about 114 feet.

Q. Now, that point would be almost immediately south of the Enid Ice and Fuel Company would it not?

A. It would.

Q. About what distance?

A. What point on this platform?

Q. I gave you from the east side of the platform; I mean the north end of the platform east to the east side of track 6?

A. 142 feet.

Q. That point would be what distance south of the Enid Ice and Fuel Company?

A. It would be about 200 feet south of the Enid Ice and Fuel Company.

Q. Then the north end of the freight depot would be about what distance south and what distance west of the north end of the Enid Ice and Fuel Company?

A. It would be about 252 feet south and 132 feet west.

By Jno. C. Moore: "Thank you, sir. That is all."

Witness excused.

276 Recess.

By the Court: Gentlemen of the Jury: We will take a recess until 1:30 o'clock, p. m., and during the recess you will be permitted to separate, as heretofore, but remember the admonition heretofore given you not to talk about this case among yourselves or with any other person, and do not allow any one to talk to you or in your presence or hearing about the case, and form and come to no conclusion until it is finally submitted to you.

Be around here about 1:30 o'clock, but if any juror should be ten minutes late today, you will not be fined.

Thereupon, the District Court of Garfield County, State of Oklahoma, by order of Court, takes a recess until the hour of 1:30 o'clock, p. m., of this day, viz., December 1, 1913, public proclamation of the recess of the Court first being made in open Court by the Court Bailiff.

277 Afternoon Session, Monday, December 1, 1913.

Thereupon, the District Court of Garfield County, Oklahoma, convened at the hour of 1:30 o'clock p. m. of this day, viz., Monday, December 1, 1913, with the Honorable James W. Steen sitting as Judge of said Court, and the officers of the court and the parties to this cause present, as aforesaid. The jury sworn to try the issues in this cause is present in a body in the jury box, and all the jurors are admitted to be present by counsel for plaintiff and defendant.

Thereupon, the trial of this cause is resumed and the following proceedings, had, viz:

N. E. CRUMPACKER, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By Mr. Gamble:

Q. What is your name?

By the Witness:

A. N. E. Crumpacker.

Q. You live here in Enid?

A. Yes, sir.

Q. Were you living here in July, 1912?

A. Yes, sir.

Q. Did you know W. L. Turner?

A. Yes, sir.

Q. What business were you engaged in in July, 1912?

A. Manufacturing ice and ice cream.

Q. Under what firm name?

A. The Enid Ice and Fuel Company.

Q. You have a plant in Enid?

A. Yes, sir.

278 Q. In the operation of that plant do you use coal?

A. Yes, sir.

Q. Did you at that time?

A. Yes, sir.

Q. Received it in car loads?

A. Yes, sir.

Q. Who unloaded that coal for you?

A. Mr. Turner had the contract with the company at that time.

Q. Was that contract written or verbal?

A. Verbal.

Q. Do you remember seeing Mr. Turner on July 28th, the day of his death?

A. Yes, sir.

Q. Was he engaged in any work for you or your company under that contract on that day?

By John C. Moore: We object as incompetent, irrelevant and immaterial, leading.

By the Court: Over-ruled as to everything except it being leading.

By Mr. Gamble:

Q. What was he doing at the time you saw him?

By the Witness:

A. He was in our office at the time I saw him.

Q. What was he doing there?

A. He was conversing with Mr. Jackson and myself.

Q. What was that conversation about?

By John C. Moore: "We object as immaterial."

By the Court: "Over-ruled; just state what it was about."

By the Witness:

A. I think it was about Mr. Jackson unloading a car load of coal for him.

279 By Mr. Gamble:

Q. For whom?

A. For himself. They were simply jesting; that is all.

Q. Had he unloaded any coal for you on that day?

A. I don't remember; I would not say whether he did or not. According to the best of my recollection I think there was a car at the coal bin at that time.

Q. You say he unloaded all the coal for your Company?

A. He and his subordinates did.

By Mr. Gamble: "That is all."

Cross-examination.

By John C. Moore:

Q. You don't remember that he unloaded any coal for you that day?

By the Witness:

A. I could not say positively.

Q. I will ask you if he didn't unload your coal at nights?

A. Some of it.

Q. Didn't he nearly always unload it at night?

A. I cannot say that he did.

Q. Didn't he come to consult you as to when the car should be set in for unloading purposes?

A. He did at times, yes, sir.

Q. In fact, that was the usual way?

A. If the railroad didn't put them in promptly he did sometimes.

Q. Didn't he arrange with you to have the coal set in so after his hours of work for the railroad company he could unload your coal?

A. Yes, sir; sometimes.

280 Q. The most of your coal was unloaded by him at night, wasn't it?

A. I don't know whether the most of it was or not; I never paid much attention to that.

Q. This coal he unloaded for you was shipped in to you by the Rock Island?

A. Yes, sir.

Q. Where were you in the habit of purchasing coal?

By Mr. Gamble: We object as incompetent, irrelevant and immaterial.

By the Court: "Overruled."

By Mr. Gamble: "Exception."

By the Witness:

A. We purchased in different places in the Oklahoma fields.

By John C. Moore:

Q. Did you purchase any in Arkansas?

By Mr. Gamble: We object as incompetent, irrelevant and immaterial.

By the Court: "Overruled."

By Mr. Gamble: "Defendant excepts."

By the Witness:

A. Yes, we purchased some coal in Arkansas.

By Jno. C. Moore:

Q. He unloaded that for you?

A. Yes, sir.

Q. You purchased coal in Kansas?

A. I think on one occasion.

Q. He unloaded that for you?

A. Yes, sir, he or his subordinates.

281 Q. Did you purchase coal in any other state in the American Union besides Oklahoma, Kansas and Arkansas?

A. No, sir.

By Mr. Curran: We object as incompetent and immaterial.

By the Court: I don't see the materiality of it; I don't think it hurts anything.

By John C. Moore:

Q. That coal purchased in Arkansas was delivered at your place by the Rock Island Railroad?

By the Witness:

A. Yes, sir.

Q. And the cars in which it was loaded were loaded into your bins and then became empty cars of the road did they not?

A. They were given back to the road, yes, sir, after they were empty.

Redirect examination.

By Mr. Gamble:

Q. When Mr. Turner unloaded coal for you did he act as your agent or the agent of the railroad company?

By the Witness:

A. We paid him; I suppose he would be our agent.

Recross-examination.

By John C. Moore:

Q. That is simply your supposition, he unloaded it for you for so much a ton?

By the Witness:

A. Under a verbal contract.

282 Q. You don't know what arrangement he had with the Rock Island Railroad for the purpose of getting the cars back after they were empty?

A. I don't suppose he had any arrangement; we paid a demurrage after a certain time.

Q. And his work in unloading promptly relieved you of that demurrage?

A. Yes, sir.

By John C. Moore: That is all.

Witness excused.

283 W. M. HUTCHINSON, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being Re-called as a witness upon the part of Defendant, testified as follows, viz:

Direct examination.

By Mr. Gamble:

Q. State your name?

By the Witness:

A. W. M. Hutchinson.

Q. You have been on the witness stand in this case before?

A. Yes, sir.

Q. Did you see W. L. Turner on July 28th, 1912, the day of his death?

A. Yes, sir.

Q. Where were you when you first saw him?

A. I was on the cinder pile at the White Mill.

Q. At the Enid Mill and Elevator Company?

A. Yes, sir.

Q. In what capacity?

A. Well, I was supposed to be Watch man on Sunday, and to clean up around the mill and haul away ashes.

Q. You were Foreman for your Company there?

A. Yes, sir.

Q. Where were you when you first saw Turner?

A. I was standing on top of the cinder pile.

Q. Where was he?

A. He was coming walking towards me.

Q. Did he come up to where you were?

A. Yes, sir.

284 Q. What transpired there immediately after he came up to where you were?

A. He walked up and spoke to me and asked me if I thought I would have enough coal to run me until Monday night.

Q. What did he mean by that?

A. He wanted to know if we had enough coal for the boiler room.

By John C. Moore: Unless the witness knows what he meant by that we object to it.

By the Court: You didn't get the objection in in time.

By Mr. Gamble:

Q. Go ahead. Did Turner unload coal for the Enid Mill and Elevator Company?

By the Witness:

A. Yes, sir.

Q. Did he have a contract to do that?

A. Well, sir, I guess he had.

Q. Did he unload all their coal?

A. Yes, sir, he practically unloaded it all.

Q. Was he handling coal for them on that afternoon?

A. Well, I could not say as to that; I guess he must have been, I don't know; I could not say.

Cross-examination.

By Jno. C. Moore:

Q. When you say he must have been unloading some coal off the ground for the mill that afternoon?

By the Witness:

A. He was picking up coal.

285 Q. Well, he was pitching it from the ground into the car.

Now, I will ask you if it was in regard to that particular car of coal he was asking you about, when he asked if you would have enough to run until Monday night?

A. Yes, sir.

Q. When he unloaded coal for your Company he did it at night did he not?

A. Yes, sir, practically all at night.

Q. He would go to see you when you would need coal and arrange with Mr. Wagner to have it set in for his accommodation at night, is that true?

A. Yes, sir.

Q. That is, after his hours of labor were done for the day with the Rock Island road?

A. Yes, sir.

Q. Then he simply came to you for an arrangement about setting in the coal?



A. He came to find out if I would have enough to run me until Monday night.

Q. Now, I will ask you if it was while you were talking about that the *the* train 24 whistled?

By Mr. Gamble: We object as incompetent, irrelevant and not proper cross-examination.

By the Court: "Overruled."

By Mr. Gamble: "Defendant excepts."

By the Witness:

A. Yes, sir.

286 By John C. Moore:

Q. And then followed right on the other conversation that you have detailed before?

A. Yes, sir.

By John C. Moore: That is all.

Redirect examination.

By Mr. Gamble:

Q. You stated he was picking up a car of coal that day?

By the Witness:

A. It was storage coal, yes.

Q. Whose coal was it?

A. It belonged to the mill company.

Q. He was picking it up for the mill?

A. Yes, sir.

By Mr. Gamble: That is all.

Witness excused.

287 CHARLES JACKSON, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. Charles Jackson.

Q. Where do you live?

A. Lincoln, Nebraska.

Q. How long have you been living there?

A. About eight months.

Q. Where were you living on the 28th of July, 1912?

A. Enid, Oklahoma.

Q. What was your business at that time?

A. Assistant Ice Cream Maker for the Enid Ice and Fuel Company.

Q. Were you acquainted with W. L. Turner?

A. I was.

Q. Do you remember the occasion of his being killed in the yard at Enid?

A. Yes, sir.

Q. Had you seen Mr. Turner that day?

A. I had.

Q. When and where?

A. In the plant of the Enid Ice and Fuel Company.

Q. What time of day was it?

A. Approximately about five o'clock in the afternoon.

Q. Did you have any conversation with him on that day in regard to loading coal?

A. I did.

288 Q. What was the substance of that conversation?

A. He was loading a car of coal for the Enid Mill and Elevator and it was along in the evening he came through the plant and wanted to employ my brother and me to help him finish it up.

Q. Where was that car he was loading for the Enid Mill and Elevator Company?

A. About half way between the plant and the Texas Oil Company.

Q. How long was Mr. Turner about the plant at the time you had this conversation?

A. I think about a half hour.

Q. How long after he left there did you hear of his death?

A. Well, about ten or fifteen minutes.

Q. Did you go over to where his body was?

A. I did.

Q. Where with reference to the freight house did you find the body?

A. Well, it was to the best of my recollection, right east of the north end, somewhere along there.

Q. About opposite the north end of the depot?

A. Yes.

Q. When Mr. Turner left, what, if anything, did he say in regard to where he was going?

A. I think he said something——

By John C. Moore: Wait I object because it is immaterial and because it is calling for the statements of a man at a time when it is not proper *res gestæ*.

By the Court: They have a right to testify what he said; overruled.

289 By Jno. C. Moore: If your honor please, William Turner's cause of action would have been for his injury, and we are not bound by these statements.

By the Court: Give an authority on that.

By Jno. C. Moore: Yes, sir, the 228th U. S.

By the Court: I would like to look at it; there is no question but

what they have a cause of action on account of his death, but I don't think that takes it out of the rule; if you have an authority saying that is incompetent, of course, I will follow it.

By Jno. C. Moore: I would have to go and get the 133rd and 134th Pacific—

By the Court: Well, I will let it in; I don't understand the law to be that way, Colonel; I am not egotistical about it, though, and would change my mind if you convince me otherwise.

Objection over-ruled; exception allowed.

By the Witness:

A. I think he said he was going to supper, but I won't be sure.

By W. H. Moore:

Q. That was about what time?

A. About five o'clock; possibly a little after five.

Q. This conversation, you say, took place at the Enid Ice and Fuel Company? (Exhibiting blue print Exhibit One to witness).

A. It did.

Q. What part of their plant there?

A. (Indicating on Ex. One.) It was in the northeast corner of the ice cream department.

290 Q. And the place you saw his body after you heard of his death was in what direction from that?

A. South-west.

Q. Was the point where you found him in line with the road he would go to go home?

A. Well, straight through, I suppose it was, but I don't know the exact road he would take.

Q. It was in the direction of his home?

A. Yes.

By W. H. Moore: "That is all."

Cross-examination.

By Jno. C. Moore:

Q. Were you sworn before in this case when the cause was pending in the United States District Court; you were, were you not?

By the Witness:

A. I was; I think so, I am not sure.

Q. You were sworn at Lincoln, Nebraska?

A. Yes, sir.

Q. I will ask you if in the testimony you gave at Lincoln, Nebraska, you stated that Mr. Turner came into your place at about five o'clock in the afternoon of that day?

A. I think so.

Q. And didn't you state he remained there for twenty to twenty-five minutes?

A. I don't remember that I said the exact time, but something like that.

Q. In point of fact he did remain there for 20 or 25 minutes?

A. Yes, something like that.

Q. When he left the ice plant did he go out of the east door?

A. No, sir.

291 Q. What door did he go out at?

A. The west door.

Q. That would be by the side of the railroad track?

A. Yes, sir.

Q. Now then I will ask you if the north part of the Enid Ice and Fuel Company isn't what they call the pop room?

A. It is.

Q. That is where you bottle pop?

A. I guess so.

Q. And the next room south of that is the ice cream room?

A. It is.

Q. It is in that room where you had the conversation?

A. Yes, sir.

Q. Is there a door leading from the ice cream room to the railroad tracks?

A. No, sir.

Q. Then he went out of the east door of the ice cream room?

A. No, sir.

Q. Which door did he go out at?

A. The south door.

Q. Awhile ago you said the west door?

A. You asked about the west door of the plant.

Q. Did he go through a door in the ice cream room south into another part of the building?

A. He did.

Q. What is that?

A. A hall-way.

Q. That runs clear through east and west?

A. It does.

92 Q. Did he close the door after him?

A. He did not.

Q. Did you see which way he turned?

A. Yes, sir.

Q. You didn't testify to this in the examination in Lincoln, Nebraska?

A. I was not asked those questions.

Q. Answer my question. Did you testify to that?

By W. H. Moore: He has answered.

By John C. Moore:

Q. Did you see him go out of the west door?

By the Witness:

A. I did not.

Q. It is only an inference then?

A. I saw him go down the hall towards the west door.

Q. That is all you know about it?

A. Yes, sir.

Q. He might have turned around to go back east?

A. I think not, because I was in the hall.

Q. And still you didn't see him go out of the west door?

A. I did not.

Q. How far south of the pop room door is that door which leads east out of that hall?

A. About fifty or sixty feet.

Q. Is there a door leading out of the ice cream room to the east?

A. There is.

Q. How far is that door south of the pop room door?

A. Well, I don't know the exact feet, but about four feet north of the hall.

293 Q. When he would go out of that east door, either of the hall or of the pop room, he would then be immediately in sight of the cinder pile of the Enid Mill and Elevator Company would he not?

A. He would.

Q. I will ask you if it is not a fact that the freight house is practically on a straight line between the ice plant and his home?

A. I don't know exactly where his home is at.

Q. The freight house is in a southwest direction from the ice plant is it not?

A. Yes.

Q. And his home was in a south-west direction from the ice plant?

A. I think so, yes.

Q. And the freight depot was between his home and the ice plant?

A. I think so.

Q. Now, you say it was fifteen or twenty minutes after he left the pop room before you heard he was killed?

A. I said ten or fifteen minutes.

Q. And you went to his body?

A. I didn't go right up to it; I went probably fifteen feet from it.

Q. I will ask you if you saw Will Hutchinson there?

A. I don't remember.

Q. Did you go to the cars that were standing there north of his body?

A. I walked by them.

Q. Which way did you walk when you walked by them?

A. South.

Q. They were standing south of his body at that time?

A. No, sir.

294 Q. Which way were they standing?

A. North of his body.

Q. And you went by those cars in going to his body?

A. I did, yes, sir.

Q. How did you get through from the pop room?

A. I didn't go out of the pop room.

Q. How did you get out of that room?

A. I went out of the west door of the ice part.

By Jno. C. Moore: That is all.

Witness excused.

295 J. A. BOWMAN, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. J. A. Bowman.

Q. Where do you live?

A. At Utica, Illinois.

Q. By what company are you employed?

A. By the Rock Island.

Q. How long have you been in the employ of the Rock Island?

A. All together about eleven or twelve years.

Q. In what capacity?

A. Most of the time a station agent and yard master.

Q. In what capacity were you employed on the 28th of July, 1912?

A. As agent and yard master at Enid.

Q. Were you acquainted with W. L. Turner?

A. Yes, sir.

Q. Do you remember the incident of his death?

A. Yes, sir.

Q. Immediately prior to his death, do you know of any contracts he had with the Rock Island Railroad Company for work at Enid?

A. Yes, sir.

Q. In a general way, what were they?

A. We had a contract for him to take care of the coal chute and for the cooperage of our cars.

Q. Did he do any work aside from that in transferring freight?

A. Yes, sir, but not under contract.

296 Q. How was he employed to do that work?

A. He was employed the same as we would employ any other extra labor. We are allowed at Enid an extra laborer and whenever work shows up to require it we have authority to employ an extra man to take care of that work, and we would call Mr. Turner to do it when he had time.

Q. In what way did you pay him?

A. At times he was paid by voucher and at times he was carried on the labor roll.

Q. At the time, July 28th, 1912, was he or not employed in this extra way that you speak of?

A. He was not.

Q. At the time of his death did he have any duties to perform except those covered by the two written contracts to which you refer?

A. He did not.

Q. Where were the cars—when he would cooper cars, where was that work done?

A. At various places, depending on the condition of the yards. Depending on how many cars we had in the yards. As a rule the cars were placed on what we called the stock track, and on track number five, I believe it was.

Q. Look at this blue print (Handing Exhibit One to witness) and tell us which track you refer to as the stock track?

A. The farthest track east.—south, of the depot, down near the stock pens. (Indicating on Exhibit One.)

Q. Are you able to say whether or not there were any cars being coopered in the yard on the 28th of July, at the time of Mr. Turner's death?

A. I could not say.

297 By W. H. Moore: That is all.

Cross-examination.

By John C. Moore:

Q. You were sworn and gave your testimony at Utica, Illinois, at the time this case was pending in the United States District Court for the Western District of Oklahoma?

By the Witness:

A. I was sworn at Utica, Illinois; I could not say as to where the case was.

Q. I hand you Plaintiff's Exhibit B and ask you if your signature is attached to it?

A. I don't find it; no, sir.

Q. I hand you Exhibit A and ask you if your signature is attached to that contract?

A. Yes, sir.

Q. What is that contract commonly called; what are the duties under that contract?

By W. H. Moore: We object; it appears to me that the contract will speak for itself.

By the Court: "Objection sustained."

By John C. Moore: "Exception."

By John C. Moore:

Q. I will ask you if Exhibit B or a copy of it was handed to you at Utica, Illinois, for examination?

By the Witness:

A. I could not say.

298 Q. I will ask you if Mr. Gamble didn't submit for your examination a contract for unloading into the chutes and for picking up coal and for unloading coal to the stationary engines, and cord wood, cinders and sand?



A. Mr. Gamble handed me two contracts, and as I remember, one of them covered that.

Q. You testified in regard to the duties of Mr. Turner under this contract for unloading, did you not?

A. Yes, sir.

Q. I will ask you if you didn't testify that you knew of Mr. Turner unloading coal from the cars at Enid into the road and and switch engines?

A. Yes, sir.

Q. You were asked if he was engaged in doing this kind of work when you first went to Enid?

A. I don't remember.

Q. Did you not testify in answer to that question, "Yes, sir"?

A. I don't remember.

Q. I will ask you if in fact he was engaged in doing that sort of work when he first came to Enid?

A. Yes, sir.

By Mr. Curran: We object; there is nothing there to contradict what he is testifying to here.

By the Court: Sustained. There is nothing shown about when he came to Enid, how remote it was or anything about it.

By John C. Moore:

Q. I will ask you when you came to Enid?

By the Witness:

A. On February 1st, 1912.

299 Q. Was Mr. Turner here in the service of the road at that time?

A. Mr. Turner was employed under contract at that time.

Q. He was performing services under that contract?

A. Yes, sir.

By the Court: Is there any controversy about that?

By W. H. Moore: Not a particle in the world.

By John C. Moore:

Q. Who was the owner of the coal he loaded into the chutes under that contract?

By the Witness:

A. The Rock Island Railroad Company.

By Mr. Curran: We object as incompetent and move to strike that out.

By the Court: That answer is stricken out.

By John C. Moore:

Q. Was he working under your orders and directions here?

By the Witness:

A. He was as far as his contracts were concerned.

Q. Who had charge of the ordering of cars placed to these chutes?

A. I did.

Q. Where did you get your orders from?

A. I made my own orders.

Q. Who gave you the information?

A. We had the information.

Q. From whom?

A. From our records at the office.

300 Q. When the coal was out on the chutes and when it was necessary to place coal on the chutes, whence did you get that information?

A. We had information from the coal reports.

Q. Who made those coal reports?

A. The Chief Clerk part of the time, and another time I think there was another clerk signed for the work.

Q. Didn't Mr. Turner communicate the fact about the coal on the chutes?

A. He would possibly come to the station and say he had unloaded all the coal there was in the car and would possibly say he had no more coal in the chutes.

Q. Did you always look to him to inform you when it was necessary so that the coal belonging to the ice plant and the mill could be set in those places?

A. No, sir.

Q. From where did you get that information?

A. We had that information.

Q. It was an original proposition from you?

A. If we received a car of coal for the Enid Mill and Elevator Company we set it; we took a check of the yard each morning; if the track was full we would not, but if there was room for the car we set the car in.

Q. Who pointed out if you had any cars to cooper for grain?

A. The cars Mr. Turner was to cooper for grain we set on the stock track and track five; those cars were marked "O. K'd for grain."

Q. From whom did Mr. Turner get instructions about handling work performed by him?

A. Under his contract, from me.

Q. You directed him what to do?

A. Yes, either me or my Chief Clerk.

301 Q. So that he was under your supervision and control all the time?

A. In so far as the contracts were concerned, yes, sir.

Q. How did you happen to get that "in so far as his contracts were concerned," Mr. Bowman?

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: I don't think that reprimand is necessary.

By John C. Moore:

Q. He performed his duties in accordance with what you directed him to do?

By the Witness:

A. Yes, sir.

Q. I will ask you if all this coal he handled for the chutes if that was Rock Island coal?

A. Yes, sir.

By John C. Moore: That is all.

Redirect examination.

By W. H. Moore:

Q. If a car of Company coal was delivered into the Enid yard did you get any billing or record information in regard to that?

By the Witness:

A. Yes, sir, the conductor either had a record way bill or a card way bill covering that coal.

Q. So when he left the car here he turned a record over to your office?

A. Yes, sir.

302 Q. That is all the information you needed in regard to it?

A. Yes, sir.

Q. When a car of coal was to be unloaded at the chutes, you would tell Turner to unload it?

A. Well, not exactly; if the car was in the chutes and the pockets were not full, Mr. Turner would unload the coal.

Q. Did you have anything to do with directing him in detail as to how he performed the terms of his contract?

A. No, sir.

By W. H. Moore: That is all.

Witness excused.

303 GEORGE E. WALLACE, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being Re-called as a witness for the Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. You are the same George Wallace who was on the witness stand yesterday?

By the Witness:

A. Yes, sir.

Q. At that time you testified you were locomotive engineer for the Rock Island Railway Company?

A. Yes, sir.

Q. How long have you been in the railway service?

A. All together twenty-five years.

Q. How long have you been employed by the Rock Island Railroad?

A. Twelve years.

Q. In what capacity?

A. As engineer.

Q. You testified you were the engineer on 2113 that killed Mr. Turner?

A. Yes, sir, I was.

Q. When you came into Enid that afternoon, I believe you testified yesterday, that you cut your engine and a part of your train loose and went to the south end of the yards?

A. Yes, sir.

Q. That you then backed down on track Number Two, north?

A. Yes, sir.

Q. And that you had at that time your engine, tender, a box car and the flat car loaded with machinery?

A. Yes, sir.

304 Q. Now, as you were backing down there what brakemen were on the train?

A. I had one brakeman on the flat car, that was the rear car, backing on track Two; and Brakeman Kendrick came across and got on the flat car also.

Q. About where with reference to the freight depot, if you know, did Mr. Kendrick get on the flat car?

A. Considerably south of the end of the freight depot.

Q. What position did Mr. Kendrick take on the car when he got on it?

A. He sat down on the side of the car on the west side of the car.

Q. That would be on your side of the engine as you were backing up?

A. Yes, sir.

Q. At what speed were you going, Mr. Wallace, as near as you can tell from the time Mr. Kendrick got on the car until you received a signal to stop, what was your speed in through there?

By Jno. C. Moore: I object.

By W. H. Moore: I will change it then.

Q. What was your speed up until the time you stopped?

By the Witness:

A. Between eight and ten miles per hour.

Q. What, if any, signals did you receive as you were backing up there; tell the jury all about the occurrence there up to the time you killed Mr. Turner; tell it in your own way?

A. We were backing down track two towards the north end of the yard; Brakeman Kendrick was with his side to me, facing the west, and could see the entire yard and all around. I was  
305 sitting in the cab window with the biggest portion of my body outside of the cab window, with my right hand inside to operate the engine, if necessary, watching where I was going and watching the brakeman.

Q. What was the first thing that you saw that attracted your attention?

A. I saw Brakeman Kendrick put his hand out like that (indicating) and make a part movement to get on the car, and then turned around and gave me the same signal again. (Indicating twice violent stop signal) and when he did so I used the emergency brake.

Q. What is that? (Indicating as did witness).

A. That is the violent stop signal.

Q. He gave it the second time?

A. Yes, sir.

Q. How close together did those two signals come?

A. The first signal he turned his head kind of away from me and then he made a half movement to get on the car, and then he gave it again and then he looked back.

Q. Now, was there any appreciable time between those two signals; did they follow each other almost instantly?

A. Almost instantly.

Q. What did you do when you got that signal?

A. I used my emergency brake.

Q. What is that?

A. The emergency brake is the heaviest braking power we have.

Q. How did you put on your emergency brake?

A. There is five positions to the brake valve, and the extra pull back is the emergency application.

306 Q. When you give it the emergency you have given it every pound of air you have got?

A. Yes, sir.

Q. What was there that you could have done to have stopped that engine after you got the signal that you didn't do?

A. There was nothing more for me to do; I had used the full maximum braking power.

Q. You had done all that could be done?

A. Yes, sir.

Q. Was that train equipped with air brakes?

A. Yes, sir.

Q. Do you know whether or not they were coupled up on the flat car and the box car?

A. Yes, sir; I know they were.

Q. After you applied the air, how far did your train travel before it stopped, approximately?

A. About 140 feet as near as I could judge.

Q. When your train stopped, then what did you do?

A. When we came to a full stop, Kendrick, after this accident occurred, he got off—when we stopped he was about opposite my cab window; he says "We ran over a man"; he says "There he is", and I saw a man on the track just a few feet ahead of the pilot, probably twelve feet, and we backed down then about two and a half or three car lengths away from there and I got off my engine and Kendrick and I went to the man.

Q. He was dead?

A. Yes, sir; I presume he was.

Q. And was badly mangled?

A. Yes, sir; his head was crushed and one leg cut off.

307 Q. Before you got this signal from Brakeman Kendrick this violent stop signal, had you seen anything of any one on the track?

A. No, sir.

Q. Were you looking down the track on your side of the engine?

A. Yes, sir; all the time when I was moving.

Q. Do you know whether or not your bell was ringing as you went down?

A. Yes, sir, it was.

Q. Whereabouts is this valve that works the air on your engine?

By John C. Moore: "We object as immaterial."

By the Court: "Over-ruled."

By the Witness:

A. The brake valve is in conjunction with the throttle—very handy—just about ten or twelve inches lower than the end of the throttle and a very handy place to use.

By W. H. Moore: "That is all."

Cross-examination.

By John C. Moore:

Q. Then, Mr. Wallace, Mr. Turner had already been run over when you received the signal from Mr. Kendrick?

By W. H. Moore: "We object as improper cross-examination, the witness having said nothing of the kind."

By the Court: Sustained; I don't think you have a right to assume that fact.

308 By John C. Moore:

Q. What was the total length of the train you were running at that time?

By the Witness:

A. Those locomotives, I believe, are about——

Q. Well, do you know?

A. I never gave them a measurement——

Q. I will ask you if you had not run as far as 160 feet before you stopped?

A. No, sir.

Q. You think it was about 112 feet or 132 feet?

A. I didn't say so.

Q. How far did you say you had run before you had it stopped?

A. About 140 feet.

Q. You think you ran about 140 feet after you got the signal?

A. Yes, sir.

Q. Well, if your train was not 140 feet long, then you had run over Mr. Turner with the rear car or with the flat car before you got the signal, is that true?

By W. H. Moore: Defendant objects as argumentative to begin with, and not proper cross-examination.

By the Court: Yes, it is argumentative. You can ask him about the length of the train and then make your conclusions to the jury, but I don't think you have a right to make an argument about it with the witness.

By Jno. C. Moore:

Q. I will ask you if you had kept the bell continuously ringing from the time that you left the main track?

By the Witness:

A. Yes, sir, the bell was ringing when we left the main track.

309 Q. How many switches did you have to pass from the main track before you went on to Track Two?

A. That would be the third switch.

Q. At which switch was it Mr. Kendrick came to you and got on the flat car?

A. We were already on Track Two when he came across; we were over the switch.

Q. Did you stop after passing the switch?

A. No, sir.

Q. Did you stop after passing the switch on to the house track—that is, after passing over the switch from the main track?

A. I don't understand.

Q. When you left the main track to go on to the next track, did you stop for the closing of the switch?

A. No, sir.

Q. Where is it that you started to back?

A. We had put a number of cars, I am not certain on which track, either on the passing track or on number One; we then moved ahead over the switch leading on to that track and the switch was thrown and then we backed in on to number Two track.

Q. On what track were you when you began to back so as to get on to track two?

A. We would be on the lead.

Q. You came to a stop on the lead before backing?

A. Yes, sir.

Q. I will ask you if you gave any signal for backing when you started away from the lead?

By W. H. Moore: We object as incompetent, irrelevant and immaterial.

310 By the Court: "Let him answer."

By W. H. Moore: "Defendant excepts."

By the Witness:

A. No, sir, I gave no signal to back up other than the ringing of the bell.



By John C. Moore:

Q. You gave no sound of the whistle?

A. No, sir.

Q. You didn't give three blasts—short blasts—of the whistle?

A. No, sir.

Q. I will ask you, before you struck Turner, if you gave two short blasts of the whistle?

By W. H. Moore: We object as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled; I don't see the materiality of it though."

By the Witness:

A. The bell was kept ringing; that was the only signal of movement.

By John C. Moore:

Q. You gave no blasts of the whistle?

A. No, sir; for the reason there was no crossing, either public or private crossing near.

Q. I will ask you if there was a passenger train passing you at that time?

A. Yes, sir?

Q. I understand you to say that you gave no signals with the whistle?

A. I didn't use the whistle.

Q. At no portion of that backing up?

A. No, sir

311 Q. How many taps of the engine bell did you give before you began to back?

A. They were too numerous to count; the bell was constantly ringing.

Q. I am talking about the time you were standing on the track before you began to back?

A. I could not say.

Q. You don't remember that you gave any?

A. Yes, sir, I fully recollect that the Fireman was at his station ringing the bell when we started to move.

Q. No, I mean before you started to move?

By W. H. Moore: If your honor please, we object to all of this and insist that it is entirely immaterial.

By the Court: "Let him answer."

By W. H. Moore: "Defendant excepts."

By the Witness:

A. I am not certain of the bell ringing while we were standing still.

By Jno. C. Moore:

Q. Did you give a signal of any kind to start to back?

A. I answered that question by saying that the bell was rung.

Q. You don't say that that bell was rung before you commenced to back?

A. At the instant we started to move the bell was rung.

Q. But not long enough to give any individual notice that you were going to back?

A. The Fireman was ringing the bell.

Q. Now, Mr. Wallace, how did it happen that Mr. Kendrick was standing by the track as you approached him with the engine backing up, did you see him get off the car?

By the Witness:

A. I don't understand the question.

312 (Here the last question above was read to the witness by the Reporter.)

A. No, sir, I didn't see him get off the car.

Q. He was standing there, was he, by your side?

A. I didn't see him standing anywhere.

Q. Didn't you testify that as you came up with the engine he was standing at the side of the track and called to you and told you that you had killed a man?

A. That is when the accident occurred—he jumped off, I seen him jump off the car and turn towards me, but at the same time he was giving a signal to stop.

Q. Was that the first signal he had given you?

A. No, sir, before he left the car I received two signals from Brakeman Kendrick.

Q. You don't know and you cannot tell now whether you had passed over Turner at that time or not?

A. I didn't know the cause of the signals.

Q. You cannot state now whether you had struck Turner at that time or not?

A. I don't know.

Q. You don't know whether those signals were given to you before or after you struck Turner, do you?

A. I could not answer that, because, I did not see Turner at any time.

Q. So in point of time of striking Turner, you don't know when these signals were given, do you?

By W. H. Moore: He said he didn't; this is useless repetition.

By the Court: Yes sir. Proceed.

313 By Jno. C. Moore:

Q. How far north of the body was it when you got your engine stopped?

By the Witness:

A. I have answered that. About ten or twelve feet.

Q. When you stopped the engine and saw the body of Mr. Turner

lying there on the track, did you continue to see it until the first person came there?

A. Yes, sir, I believe I did.

Q. Who was that person?

A. Kendrick, the brakeman, and myself were the first to the body.

Q. Did the Conductor come?

A. Some time afterwards.

Q. I will ask you if Mr. Kendrick or yourself touched the body in any way?

A. No, sir.

Q. Did you see the Coroner, the man that came there to swear you?

A. Yes, sir.

Q. I will ask you if the body had been touched up to the time of that?

A. No, sir.

Q. Did you see the undertaker there?

A. Yes, sir.

Q. Had the body been touched up to the time the undertaker got there?

A. No, sir.

Q. It lay in the same position then as when you first passed over it?

A. Yes, sir.

By Jno. C. Moore: "That is all."

Witness excused.

314 J. G. PORTELLE, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. J. G. Portelle.

Q. Where do you live?

A. Enid, Oklahoma.

Q. What is your business?

A. Brakeman for the Rock Island.

Q. How long have you been in the railroad service?

A. Eight years next June.

Q. How long have you been working for the Rock Island?

A. Eight years in June.

Q. Were you one of the brakemen on the train that ran over Mr. Turner in the yards?

A. Yes, sir.

Q. Did you see the occurrence?

A. Yes, sir.

Q. Tell the jury all about it, will you?

A. Well, we backed in on number two track to get a car; we had a flat car, a box car and the engine and we were backing up, and as we had started down number two track—we had cut off a cut-off of cars on the passing track and Mr. Kendrick rode the cut of cars down on the passing track—it must have been about eight cars—and we stopped and picked him up and he got on the end of this flat car——

315 Q. Did you stop dead still when you picked Kendrick up?

A. No, we must have been going two or three miles an hour when we picked Kendrick up, and we went on down——

Q. You have not told the jury where you were standing.

A. When Kendrick got on, I was on this side, and got about the center of the flat car; and Kendrick sat down on the flat car on the engineer's side on the north-west corner; we went on down and we saw Mr. Turner—it must have been two car lengths that I saw him—he was between tracks two and three facing the north and walking north; he was walking in a safe place then, and as we come on down he kind of angled over across number two track, the track we were coming down on; it must have been about a half car length, I judge, from us where he started to cross the track, and we both hallowed at him and give the engineer a stop signal.

Q. What did you do, if anything, towards giving a stop signal?

A. I walked to the right hand side to give the stop signal and Kendrick was in a better position to give it and he gave it, and I walked back on the car and kept hallowing to get him off the track, but he didn't get out; he was facing north and about that time we hit him and just before we hit him he turned to the left; I was standing right over him,—and he turned to the left, and at that time the draw-bar hit him and killed him.

Q. At what speed were you going when he got upon the track, in your judgment?

A. Well, I judge we were going five to eight miles an hour; something like that.

316 Q. How far did the train run after Mr. Turner was struck?

A. Well, I judge about two car lengths. No, after he was struck we had run over him with those two cars and possibly the engine was a half car length from him.

Q. What did you do after the car stopped?

A. As quick as we hit Mr. Turner I jumped off the flat car and went ahead to the engine and told them we had killed a man.

Q. On which side did you go up on?

A. On the engineer's side.

Q. Do you know what Mr. Kendrick did?

A. He was sitting on the car at the time and then he came up here too.

Q. Do you know whether or not that train was equipped with air brakes?

A. Yes, the air was coupled up on the flat car and the box car both.

Q. What do you mean by coupled up?

A. It was in service, connected with the engine.

Q. Was it working?

A. Yes, sir.

Q. After Mr. Turner started to angle across the track, when he started to leave the place between the two tracks, what if anything, was there that you could have done that you did not do to have prevented the injury?

By Jno. C. Moore: "We object as calling for an opinion of the witness."

By the Court: "Let him state what he did."

317 By the Witness:

A. No; there was nothing else to do only to hallow and get him out of the way and give stop signals; he didn't hear us hallow, I guess, and there was nothing else to be done.

By W. H. Moore: That is all.

Cross-examination.

By John C. Moore:

Q. Did you hallow?

By the Witness:

A. Yes, sir; I hallowed as loud as I possibly could.

Q. When you hallowed, in what direction was Turner walking?

A. Well, he had angled across from this safe place where he was walking between the tracks up into Number Two track, and the hallowing was when he was in number two track.

Q. You hallowed while he was in the track?

A. Yes, sir; I and Kendrick both.

Q. Did you hallow before he had stepped over the west rail with his left foot?

A. Well, yes, before he was in danger at the end of the ties before he came to that.

Q. I am asking you if you hallowed before he stepped over the west rail with his left foot?

A. He was coming from the east side——

By Mr. Curran: We object; counsel is assuming that this witness testified he stepped over the west rail and he has not done it.

(Here, at the request of counsel for plaintiff the last question above was read to the witness by the Reporter.)

318 By the Witness:

A. He never did go over the west rail at all; he was hit in the center of the track.

By Jno. C. Moore:

Q. Which way was his face when he was hit?

A. He was facing north.

Q. Was he walking north?

A. Yes, sir, more north than any other way.

Q. He hadn't got to the west rail?

A. No, sir.

Q. Where were you at the time he was hit?

A. Right on the center of the car, right over him.

Q. Hadn't you been to the north-east corner of the car?

A. No, sir; I had been to the north-west corner.

Q. Who else was in the north-west corner?

A. Kendrick was sitting on the north-west corner.

Q. At the time he was hit were you in the center of the car?

A. Yes, sir.

Q. Over the draw-bar?

A. Yes, sir.

Q. Did you see where the draw-bar hit him?

A. Yes, sir.

Q. Where; show the jury?

A. Right in here. (Indicating near center of back.)

A. How high up?

A. Right in here? (Indicating just above hips.)

Q. That threw him on his face?

A. I could not tell which way he fell, because he went out of sight; he went forward though.

Q. And the car went right over him?

A. Yes, sir, the best I know; I was on top.

319 Q. When did you get off the car?

A. I jumped off about the time it ran over him or a little afterwards.

Q. Which side of the car did you jump off on?

A. On the engineer's side.

Q. You had to go to the other side to jump off?

A. Yes, sir.

Q. You left Kendrick on the car?

A. Yes, sir, he was sitting on the car.

Q. Did you walk anywhere?

A. I walked towards the engine and told him we had run over a man and then walked up to Mr. Turner.

Q. Did you walk towards the engine from where you jumped off?

A. Yes, sir.

Q. How far did you walk?

A. I don't know how far I walked.

Q. Was the engine coming towards you?

A. Yes, sir. May be I walked half a car length.

Q. And then the engine came close enough so you could talk to Mr. Wallace?

A. Yes, sir.

Q. What did you say to Mr. Wallace?

A. I told him we had run over a man.

Q. Had the engine passed over the body then?

A. Yes, sir.

Q. Then you didn't walk at all towards the front of the train?

A. We were backing up then; that was the head end of the train.

Q. You went farther forward than where Mr. Turner's body lay?

A. No, sir, I went up to the body.

Q. And staid there until the engine came?

A. No, sir, I passed the engine before I got to the body; we were backing up.

320 Q. So, up to that time Mr. Wallace didn't know Mr. Turner was killed, did he?

A. I guess he did—I don't know whether he did or not; I told him we had run over a man.

Q. I will ask you how close you were to Mr. Turner when a signal was given to Mr. Wallace to stop?

A. Well, sir, I judge the first signal was about half a car length from him.

Q. That is the signal given to Wallace?

A. Yes, sir.

Q. How far were you from Mr. Turner when you hallowed for him to get out of the way?

A. We started to hallow at the same time we commenced giving the signal.

Q. Wasn't he walking leisur-ly along?

A. He was walking along unconcerned.

Q. He hadn't observed you, had he?

A. I don't know whether he had or not; I would think he would coming down there that way.

Q. He didn't show any signs of noticing your coming, did he?

A. No, sir, not by staying up in the track he never.

Q. He didn't do anything that indicated he knew you were coming?

A. He whirls around when we hallowed, just before he got hit.

Q. Which way did you say he turned?

A. He turned to the left.

Q. Was he hit near the center of the back or to the left of the center of the back?

A. Near the center of the back it looked to me.

321 Q. He turned because he heard the hallowing, didn't he?

By W. H. Moore: We object as calling for a conclusion of the witness.

By the Court: I don't see how he could tell whether he heard the hallowing or not. Sustained.

By Jno. C. Moore: "Exception."

By Jno. C. Moore:

Q. He actually did turn when he heard the hallow, didn't he?

By the Witness:

A. We hallowed before that and he never turned.

Q. I didn't ask that; answer my question?

A. We were hallowing when he turned, yes, sir; we were hallowing before he turned and after he turned.

Q. How many times did you hallow?

A. I judge about four or five.

Q. How far from him were you when you first hallowed?

A. We were about a half car length when we commenced hallowing.

Q. How many times did Kendrick hallow?

A. I judge he hallowed about the same number of times I did.

Q. So between you both, you hallowed eight times?

A. Eight or ten times, yes, sir.

Q. How long after you commenced hallowing before he turned?

A. We had run the distance of about a half car length.

Q. At what rate of speed?

A. We were going five or eight miles an hour, I judge.

Q. How many steps did he take in that time?

A. Well, he possibly took eight or ten or twelve steps; something like that.

Q. How far is it across that track?

A. Well, sir, from where he was in danger, from one end of the ties to where he was hit, he was just half way, he probably made that in two or three steps and then he walked north.

322 Q. He was actually walking north in the center of the track when you hit him?

A. Yes, sir.

Q. With his face to the north?

A. Yes, sir.

Q. And when he turned which direction did he turn?

A. He turned to the left and looked back.

Q. How far did he turn?

A. Well, sir, he had just got his head around about the time it hit him.

Q. Did he turn any portion of his body around?

A. He might have moved his body a little bit; I noticed his head more than his body.

Q. Did you see his body after the train ran over him?

A. Yes, sir.

By Jno. C. Moore: That is all.

Witness excused.

323 R. G. KENDRICK, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. R. G. Kendrick.

Q. What is your business?

A. Brakeman.

Q. Where do you live?



A. El Reno.

Q. By what company are you employed?

A. The Chicago, Rock Island and Pacific Railway Company.

Q. How long have you been in the employ of that Company?

A. Been braking for them six years, and was in the mechanical department about six years.

Q. What is your age?

A. Thirty-four.

Q. Were you one of the brakemen on the train that struck and killed Mr. Turner in Enid?

A. I was.

Q. Tell the jury all you know about that occurrence?

A. Well, we were backing down on this track that Mr. Turner was killed on, which was on Number Two; we come into the lead and I rode a cut of cars in on the passing track, and as he came down he slowed up and picked me up, the engineer did, and then he come on down and I noticed this man coming between the two tracks 2 and 3; he was safe on either side of where he was walking then—

324 Q. After you had ridden that cut-off of cars down on the passing track, then you went over and got on the string of cars connected with the engine?

A. Yes, sir.

Q. How many cars were on the engine?

A. We had a box car next to the engine and then a flat car with threshing machinery.

Q. When you got on the flat car was there anybody on there?

A. Yes, Brakeman Portelle.

Q. Where was he when you got on?

A. On the middle about the north end, and I got on the north-west corner and sat down.

Q. Where did you say you saw Mr. Turner then?

A. He was walking between tracks two and three in a safe place the first I seen of him.

Q. Go ahead and tell the jury all you know about it?

A. Well, we came on down the track and when we noticed him he was walking along like anybody ordinarily will, and the first thing I knew he jumped up and started to angle across the track; we were about fifteen or twenty feet from him then and Mr. Portelle and I both went to hallowing, and hallowed as loud as we could, and the first thing I did was to give a stop signal.

Q. How?

A. This way (Indicating violent stop signal with hands and arms); and we hallowed until the car struck him and passed over him.

Q. On which side of the train were you?

A. The engineer's side.

Q. How many stop signals did you give him?

A. I don't know; a man in that position would not remember everything that took place at that time.

325 Q. Was there any response to your stop signal?

A. Yes, sir.

Q. What was it?

A. He applied the air; of course, there was a little time from the time he took the signal; you have got to give him time to get the brakes.

Q. What happened when the air went on?

A. We stopped as quick as we could.

Q. In what position on the track was Mr. Turner when he was struck?

A. He was angling across and the draw-bar struck him; he was angling across, he was not going straight across.

Q. Did he make any response to the yells?

A. Not a thing in the world that I could see.

Q. Did he make any turn?

A. Just as the draw-bar hit him he turned his head.

Q. After the man was struck what did you do?

A. I don't know; the first thing I remember I jumped off the car and had my hat off, and then I walked towards the engine.

Q. You were considerably excited, were you?

A. Yes, sir.

Q. How fast, in your judgment, was the train moving at the time you gave this stop signal to the engineer?

A. Between eight and ten miles an hour.

Q. After you saw Mr. Turner in a position of danger, what was there that you could have done that you did not do, if anything, to have saved him?

By Jno. C. Moore: I object as calling for an opinion of the witness.

By the Court: I am inclined to let him state——

By W. H. Moore:

326 Q. Was there anything else aside from what you did that you could have done to prevent that accident?

By the Witness:

A. I don't think there was; the time was so short we done all we could do and that was to hallow at him.

Q. How far did the train move after Mr. Turner was struck?

A. There was two cars and the engine passed over him and about a car length from the pilot. I was kind of excited and didn't just notice how things stood around there.

Q. You were practically right there over him when he was struck?

A. Yes, practically.

Q. It was a very sad and a very distressing occurrence?

A. It was; yes, sir.

Q. How was that engine and those two cars equipped with air?

A. They had the regular air brake equipment, I think.

Q. Was the air brake coupled on the two cars?

A. Yes, sir.

Q. Was it working?

A. Yes, sir.

Q. You said when you gave the signal to the engineer he applied the air, could you feel the air come on?

A. Yes, sir.

Q. How prompt or otherwise was the response to your signal?

A. Well, he was very prompt to the signal; he reached over, I suppose, and pulled the brake valve back as far as it would go.

Q. You could feel the air come on?

A. Oh, yes.

327 Q. Did that come immediately or a long time after your signal?

A. No, it come immediately.

Q. On your signal?

A. Yes, sir.

By W. H. Moore: "That is all."

Cross-examination.

By John C. Moore:

Q. You, in that crew, were what we call the rear brakeman?

By the Witness:

A. Yes, sir.

Q. And in backing the train it is your duty to be on the rear car?

A. Yes, sir.

Q. Among other things it is your duty to be constantly ready to signal the engineer or fireman?

A. Yes, sir.

Q. Who was the fireman that day?

A. Vic Reems.

Q. Mr. Portelle was on the rear end of that car with you?

A. Yes, sir.

Q. Did he have any duty to signal to the engineer or fireman?

A. He would, yes, sir.

Q. To which one?

A. To either one of them.

Q. If he was on the fireman's side it was his duty to signal to the fireman, while you should signal to the engineer?

A. He was in the middle of the car.

Q. Was he in his proper place?

A. Yes, sir.

328 Q. Can you tell me how many feet you were away from Mr. Turner when he entered on track Two?

A. We were about fifteen or twenty feet.

Q. Do you think you could have been as much as 25 feet?

A. No, sir.

Q. What do you say the rate of speed was you were traveling?

A. Between eight and ten miles an hour.

Q. The first thing you did was to hallow at Turner?

A. That is the first thing I done to him, yes, sir, but I signalled the engineer first.

Q. How long before?

A. Just that quick. (Snapping fingers.)

Q. Hadn't you been looking at "24" come in?

A. No, sir.

Q. "24" had just come in and stopped at the station?

A. I know something went by there but I was engaged in my own business.

Q. "24" was making a lot of noise and confusion?

A. Yes, sir, it might have been.

Q. It was running north as you were going north too?

A. Yes, sir.

Q. Your tracks are how far apart?

A. We were the third track from the main line.

Q. So that there were two tracks between you and the main line?

A. Yes, sir.

Q. And both trains running north?

A. Yes, sir.

Q. I will ask you if you can recall anything about the wind that day?

A. It was a very quiet day, I believe.

329 Q. No wind?

A. No wind to speak of, no, sir.

Q. When you struck Turner did you remain on the flat car?

A. I did.

Q. What did Portelle do?

A. He remained there too; I don't know when he got off; he got off before I did.

Q. How far did you run after you struck Turner before he got off?

A. I don't know.

Q. How far did you run after you struck Turner before you got off?

A. I don't know.

Q. Did you come to a full stop before you got off the car?

A. I would not say as to that either.

Q. I will ask you if you remember that Mr. Turner had stepped his left foot clear over the west rail before you struck him?

A. He had his left foot, I believe it was, inside of the track when we struck him.

Q. Which way was he walking?

A. He was walking north when I first seen him, and he angled north-west when he went to cross the track.

Q. Did you look at him and see him looking at "24" or some other object?

A. No, sir.

Q. Which direction was he at that time from "24"?

A. He was east of the main line.

Q. Didn't you see "24" at the passenger station?

A. I don't know; it was a pretty exciting time for me and there might have been a dozen come in and I would not have seen them.

Q. Is your recollection about the accident any better than your recollection about the trains?

330 By W. H. Moore: We object as not proper cross-examination.

By the Court: "Sustained."

By John C. Moore:

Q. Can you remember the incident of Turner having stepped his left foot over the rail before he was struck?

By the Witness:

A. I would not swear as to that.

Q. Isn't it a fact that he had stepped his left foot over and was in the act of stepping with his right foot when you hallowed?

A. I would not swear to that.

Q. I will ask you if you didn't tell Victor Reems that you hallowed after he had stepped his left foot over the track?

A. I would not state which foot he had in the track.

Q. He had one foot over the track, did he?

A. He had one foot between the rails.

Q. And one on the west side of the rails?

A. He might have been in the act of bringing it over; I don't know.

Q. He was practically over the west rail at the time you hallowed?

A. Yes, sir.

Q. Isn't it a fact that he stepped that left foot over the rail on to the ground and just then you hallowed?

A. When he started to step in the track I hallowed.

Q. Didn't you hallow at him just as he stepped his left foot over the west rail of the track?

A. I hallowed at him when he went to step into the track.

331 By W. H. Moore: It is apparent that the witness is confused as to directions there.

By John C. Moore:

Q. You can remember what is east and west down there?

By the Witness:

A. I can take you down there and show you.

Q. You can remember east and west down there?

A. Yes, sir.

Q. Hadn't he stepped his left foot over the west rail of that track two when you hallowed at him?

A. No, sir.

Q. He hadn't stepped his left foot over the west rail of that track?

A. He didn't have his left foot over the west rail.

Q. Wasn't he in the act of stepping over the left rail when he was struck?

A. No, sir.

Q. Isn't it a fact when you hallowed at him he turned to the right in this kind of a manner. (Indicating by looking over right shoulder.)

A. I didn't see him make a turn of any kind until the draw-bar struck him.

Q. Stand up and show the jury where the draw-bar struck him?

A. (Standing.) He was standing this way and the draw bar struck him there. (Indicating left of center of back just above hips.)

Q. With reference to the two rails where was he when the draw-bar struck him?

A. He was very close to the center of Number Two, between the rails.

332 Q. Which direction was his face?

A. In a north-west direction.

Q. But he didn't turn to look in any direction?

A. No, sir.

Q. Did you hear any signal when the train began to back from the main track?

A. We were not on the main track; we were on the passing track.

Q. Will you tell me how you got on the passing track?

A. We headed in at the north end of the track coming in here.

Q. You didn't come on to the main track at all?

A. No, sir.

Q. Did you hear any signal while you were on the passing track as you began to back?

A. I did.

Q. What was it?

A. The bell was ringing.

Q. Did you hear any whistle?

A. No, sir, he didn't whistle.

Q. Tell the jury how many taps of the bell was given before you started to back?

A. I was not there when he started to back; I rode these cut-off cars in and I caught him as he came down and the bell was ringing when I caught him.

Q. You didn't hear the bell ring when you began to back to take off that cut of cars, did you?

A. Well, I would not swear it was or was not when we cut off the cars.

Q. After those cars were cut off then the engine ran south?

A. I don't know whether he ran south or whether he stopped before he got to the switch.

333 Q. You don't remember whether the engine proceeded far enough that it passed the switch before cutting off the cars?

A. He might have cut the cars off if he could stop before he come to the switch. I was not there.

Q. If he did that, it would be in the nature of a running switch?

A. No, sir, it is just common, ordinary kicking them in.

Q. Then he would have to retire back?

A. Then he would go back to the track where he wanted to go without going ahead.

Q. After he had pushed those cars up, he came to a stand then, did he not?

A. Yes, sir, after he cut them off.

Q. When he started to back that time did you hear any whistle signal given?

A. No, sir.

Q. Did you hear any bell signal for backing—I don't mean ordinary ringing—I mean the signal for backing?

By W. H. Moore: We object until he shows there is a signal for backing.

By the Court: Yes, sir; you had better ask him if there is a signal for backing when the engine is standing.

By the Witness:

A. If you want a man to come to you, you give him this way. (Indicating by signal with arms and hands.)

By the Court:

Q. Is there any rule that requires the engineer to do anything before he starts to backing his engine?

A. In ordinary yard work they generally ring the bell, but they never blow the whistle unless there is a crossing and there was no crossing at that end.

334 By Jno. C. Moore:

Q. Is that the rule of the Company or a practice?

By the Witness:

A. It is a rule of the Company to blow a whistle for crossings.

Q. Have you with you the book of rules?

A. No, sir; but it is in the whistle signals.

Q. What is the date of the last book of rules?

A. 1910, I believe; I would not be sure of it.

Q. I will ask you if in that 1910 book of rules that the engineer is not required to give two short blasts of the whistle before he begins to back?

A. No, sir.

Q. I will ask you if he is not required to give two short blasts of the whistle when he receives a signal to stop?

A. No, sir.

Q. I will ask you if the engineer is not required under Rule 44 to give three short blasts of the whistle when he is standing before he starts to back?

A. He is.

Q. Did you hear them?

A. I did not.

Q. I will ask you if there is a signal to stop given to the engineer by a brakeman or flagman, if he is not required to answer that with two short blasts of the whistle under Rule 42-A?

A. He answers it, yes, sir.

Q. Did you hear them?

A. I didn't hear them, no, sir.

Q. I will ask you when a brakeman or flagman neglect- to signal

to the engineer is he is not required to give four short blasts of the whistle calling for signals under Rule 46?

335 A. He is required to call for signals——

By W. H. Moore: This is objected to as entirely immaterial; these rules apply to road signals and not to yard work.

By the Court: That is the way I understand it. Sustained.

By the Witness: That is all they apply to.

By Jno. C. Moore:

Q. I will ask you this: Before starting to back, if the engineer gave two taps of the engine bell under Rule 53?

By the witness:

A. I don't know whether he gave two; the bell was ringing when he came in there.

Q. You didn't hear the two taps?

A. I did not; I heard the bell ringing.

Q. I will ask you if he didn't give you two taps for the purpose of examining the air?

A. They don't use the engine bell for that.

Q. Didn't he give you two taps with the bell to inform you that the air is working?

A. No, sir.

Q. Do you say that is not Rule 53?

A. I don't say as to that, but he don't use the engine bell for signals.

Q. I will ask you when you gave that signal to the engineer if you heard two short whistles of the engine?

A. No, sir; in a case of that kind it would have taken him longer to stop; he would have had to get the whistle and then stop.

336 Q. Isn't he required under Rule 44 to make those two whistles?

By W. H. Moore: We object as wholly immaterial; this applies to road work.

By Jno. C. Moore: That is what I have got, the rules applying to yard work, Rule 104——

By the Court: Now, "When a train is being pushed by an engine, except by shoving and making up trains in a yard"——  
(Reading from Rule Book.) The objection is sustained.

By John C. Moore:

Q. Were you acquainted with Mr. Turner during his life time?

By the Witness:

A. Not personally, no, sir.

Q. Do you know what the distance is between the two rails of the track?

A. Four feet and eight inches, I believe; something like that.

Q. From the position that Mr. Turner was walking when struck, in what manner would he likely have been thrown down?



By W. H. Moore: That is objected to as calling for an opinion.

By Jno. C. Moore:

Q. In what manner was he thrown down?

By the Witness:

A. I don't know; when we found him his head was to the east with his face downward.

Q. You don't know how he fell?

A. No, sir.

Q. But you say he didn't turn?

A. No, sir, he didn't.

337 Q. You heard no kind of signals from the train backing up except the mere ringing of the bell?

A. Yes, sir, the bell was being rung; that is all.

Q. That is all you know about the signals being given?

A. That is all that is required in yard work.

By Jno C. Moore: That is all.

Witness excused.

338 C. M. CONNELLY, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. C. M. Connelly.

Q. Where do you live?

A. 724 South Grand.

Q. What is your business?

A. I am proprietor of the Rock Island Rooming House; that is part of my business.

Q. Where were you living and what was your business in July, 1912?

A. The same business.

Q. Do you remember the death of Mr. Turner, killed in the yard at Enid?

A. Yes, sir.

Q. Were you at the depot that Sunday after-noon when he was killed?

A. Yes, sir.

Q. What was your business there then?

A. Soliciting passengers for my house.

Q. Were you there when "24" came in?

A. Yes, sir.

Q. When did you hear of Mr. Turner's death with relation to the time "24" got in, before or after?

A. I noticed when the train stopped people going back that way, and somebody said there was a man killed, so after I worked the train—I didn't get any customers that night—I went down there to where this party was killed; at that time we didn't know who it was.

339 Q. Do you recollect whether or not "24" stopped at the water crane that night?

A. I think it did.

Q. When you got to Mr. Turner's body, where was he lying with reference to the freight house?

A. It was east from near the north end of the freight house. Very near due east of the north end, I would think.

Q. When you saw the people going back there was it while the train was there stopped at the water-crane or at the depot?

A. I noticed a few starting back while it was further down, and after it got pulled up there was a lot went down there; the word came then after it pulled up there was a man killed.

By W. H. Moore: That is all.

Cross-examination.

By Jno. C. Moore:

Q. Were you in the habit of going there to solicit customers?

By the Witness:

A. Yes, sir.

Q. It was quite a habit for "24" to stop for water?

A. It always stopped; it didn't vary probably one time in thirty.

Q. And it is from that fact that you remember it stopped on this occasion?

A. Well, that would be part of the reason.

Q. Where were you on the platform?

A. My station is at the south end of the platform at the southwest corner of the depot; there is a line there where the solicitors have to stay back of. I work at the southwest corner of the platform.

340 Q. On the west side of the Rock Island depot?

A. Yes, sir.

Q. There is a City ordinance or regulation of the railroad forbidding you to go on the other side?

A. The regulation is we must work within three feet of the curb and we have a line back there that is blocked off, that is where we work.

Q. That is clear beyond the depot platform west of it, or is it three feet over on?

A. Three feet over on the platform from the west curb.

Q. And that was your station?

A. Yes, sir.

Q. And in looking south-east towards where the accident happened, you would look across a little green park covered with flowers?

A. Yes, across those trees.

Q. You cannot remember distinctly yourself that the train stopped, can you, except it was a custom for it to stop?

A. I think I remember it distinctly from the people looking back, some attraction that way, and after it pulled up some party said there was a man killed there.

Q. But nobody told you there was a man killed before it pulled up?

A. Not until after it got to the depot.

By John C. Moore: That is all.

Witness excused.

341 A. A. BAVINGTON, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. A. A. Bavington.

Q. Where do you live?

A. Bakersfield, California.

Q. Where were you living in July, 1912?

A. El Reno, Oklahoma.

Q. What was your business at that time?

A. Conductor on the Rock Island.

Q. Were you conductor on the train that killed Mr. Turner in July, 1912?

A. Yes, sir.

Q. Where were you at the time of the accident?

A. I was getting a check of some cars I had picked up on the passing track; I was between the passing track and the main track down quite a ways south of where Mr. Turner was struck.

Q. Where was your train standing, the part that was not connected with the engine?

A. My train was in what we call two pieces on the passing track; I came into Enid with a short train and headed into the passing track, knowing I had to pick up cars here, and left the rear end of my train at the crossing at the depot.

Q. At the passenger depot?

A. At the passenger depot; the caboose was just over the crossing south.

342 Q. That portion of your train, how far down did that extend?

A. Down to the freight house, may be a little bit this side of the freight house between the water crane and the freight house. The other portion was down below the freight house and down this side, back towards the mill.

Q. At the time the accident happened, were you in a position to see anything of the accident?

A. No, sir.

Q. How soon after it occurred did you get word of it?

A. After it happened Brakeman Portelle came to me and said they had run over somebody, and I came around right away and saw the body lying there and the engine and crew.

Q. So you know nothing at all of the accident itself?

A. No, sir.

Q. Do you know whether that engine was equipped with air brakes or not?

A. I do.

Q. Was it?

A. It was.

Q. Do you know whether the brakes, the air on the two cars connected with the engine was coupled on or not at the time of the accident?

A. It was; I went and tested the brakes after the accident happened, which it was my duty to do.

By Jno. C. Moore: If the Court please, the petition states it was fully equipped with air brakes, and there is no need of encumbering the record with that.

By W. H. Moore: I beg the Court's pardon; I didn't know that.

343 Cross-examination.

By John C. Moore:

Q. What is your name?

By the Witness:

A. A. A. Bavington.

Q. Was there anybody at the body when you got to it?

A. Right at the body I could not state, but I think that the crew had got down off the engine.

Q. You saw George Wallace there, did you?

A. Yes, sir.

Q. Did you see Victor Reems?

A. Yes, sir.

Q. Did you see George Kendrick?

A. I did, sir.

Q. And Mr. Portelle went with you to the body?

A. He called me and I came back as soon as I could I followed him around to where the engine was.

Q. And when you got there, five is all that was there?

A. I don't understand the question.

Q. When you and Portelle got there, George Wallace, Victor Reems and George Kendrick were all that were at the body?

A. I could not say positively, although I know that my crew was there; I could not say as to anybody else being there.

Q. Did you remain there until the Coroner or Justice of the Peace came for the purpose of holding an inquest?

A. I did, sir, although I went to the freight office and got hold of Mr. Bowman and told them to get the Coroner and somebody down there as quick as they could. Also I went to the telegraph — and notified the Dispatcher and proper officials that should be notified.

344 Q. I will ask you as Conductor if you did anything further towards reporting the injury?

A. Nothing more than to the officials and to get the Coroner down there and to Mr. Bowman.

Q. I will ask you if the body when the Coroner came was in the same position as when you first saw it?

A. It was.

Q. I will ask you if you took a statement in writing from any persons who witnessed or had a statement to make regarding the accident?

A. I didn't any more than I asked the crew how it happened.

Q. Did you ask anybody else about it?

A. No, sir.

Q. Did you take the statement of the crew in writing?

A. No, sir.

Q. Did you hear the members of the crew sworn by the Coroner?

A. Yes, sir.

Q. Who were sworn?

A. The crew, Mr. Wallace, Mr. Reems, Mr. Kendrick and Mr. Portelle; the Coroner came down and called for the crew.

Q. Did you hear anybody else sworn?

A. I could not state; I don't know whether there was anybody else or not.

By Jno. C. Moore: That is all.

Witness excused.

345 C. O. CRUMP, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. C. O. Crump.

Q. Where do you live?

A. Kansas City, Kansas.

Q. What is your business?

A. Baggage man on the Rock Island.

Q. What were you doing on the 28th of July, 1912?

A. Going north.

Q. On what train?

A. Rock Island "24."

Q. Do you recollect what time that train reached Enid that day?

A. About five o'clock; something like that.

Q. It was still day-light, was it?

A. Yes, sir; summer time.

Q. Do you recollect seeing a man struck and injured or killed on that afternoon?

A. Yes, sir.

Q. I wish you would tell the jury all you know about it, and how you came to see it?

A. I was sitting in the baggage door as we pulled into Enid; there was a switch crew switching in the yard and had a flat car with a separator on it and they were hallowing; it attracted my attention and I looked out and about that time it backed over the man, and we stopped at the crane for water and I told the Conductor they had killed a man up there.

346 Q. The first thing that attracted your attention was these men hallowing?

A. Yes, sir.

Q. How far was he at that time in front of the moving flat car?

A. I judge 35 or 40 feet.

Q. Did you see the train strike him?

A. Yes, sir.

Q. Then what happened?

A. He went under and that is the last I could see of him.

Q. Why was it?

A. There was cars in the way there.

Q. What were you sitting on there in front of the door?

A. I was sitting on a trunk.

Q. Who was with you?

A. Mr. Eppler.

Q. Who is he?

A. He is the Express Messenger.

Q. Can you give any idea of the length of time it was from the time you heard these men hallow until you saw the man go under the train?

A. Well, it was a short time.

Q. Did you do or attempt to do anything during that time that would give any idea of the time it took?

A. I tried to get out of the door in time to avoid seeing the accident.

Q. Did you?

A. No, sir.

Q. Are you able to tell how fast that freight train was moving at the time it struck Mr. Turner?

A. No, I am not.

347 Q. You were on a moving train going in the same direction?

A. I was going the same way; yes, sir.

Q. Where did you make your first stop in Enid that night?

A. At the water tank.

Q. Where next?

A. At the depot.

By W. H. Moore: "That is all."

Cross-examination.

By John C. Moore:

Q. Mr. Crump, did you see this man that was killed enter upon the track?

By the Witness:

A. He was walking down the center of the track when I saw him.

Q. In which direction was he walking?

A. Going north.

Q. You saw him struck, did you?

A. Yes, sir.

Q. Stand up and show the jury how he was struck?

A. (Standing and indicating.) He was walking this way with his hands behind him (Indicating leisurely movement with hands near hips behind back) and I suppose the draw-bar hit him about there. (Indicating near center of back just above hips.)

Q. Which way did he fall?

A. He doubled right under.

Q. Did you see him turn before he was struck?

A. He turned his head to the right just a little before the car struck him.

Q. You think he was struck about the middle of the back?

A. I do.

348 Q. I will ask you if you can remember that he had stepped his left foot or one foot over the west rail of the track at the time he was struck?

A. No, I think not.

Q. You say he stopped at the time he was struck?

A. No, sir, he just turned his head a little towards the right.

By John C. Moore: That is all.

Witness excused.

349 WILLIAM T. EPPLER, a witness, of lawful age, being first  
duly sworn by the Clerk of the Court, and being called as a  
witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. William T. Eppler.

Q. Where do you live?

A. Kansas City, Kansas.

Q. What is your business?

A. Express Messenger for the United States Express Company.

Q. Were you so employed on the 28th of July, 1912?

A. I was.

Q. What was your line on that day?

A. I was on Rock Island Train 24 between Fort Worth and Kansas  
City.

Q. About what time of day did that train get into Enid at that  
time?

A. Well, I believe 5:30.

Q. It was day-light, was it?

A. It was.

Q. Do you recollect the occurrence of seeing a man struck by  
moving flat car in the yards at Enid on that day?

A. I do.

Q. Tell the jury all you know about it?

A. I was sitting in the car and saw the switching crew back up,  
and saw a man walking down the track with his hands behind his  
back, and I heard two men hallowing and looked out and noticed  
they were going to back up over this man and before there was  
time to do anything he was struck.

50 Q. What was the first thing that attracted your attention?

A. The hallowing of the men on the flat car.

Q. Did you know the man that was walking down the track?

A. No, sir.

Q. You didn't know W. L. Turner of Enid?

A. No, sir.

Q. How far ahead of the flat car was he when you first saw him?

A. I would judge he was possibly a car length.

Q. Did you see him when the train struck him?

A. I did.

Q. Did you or not lose sight of the train then?

A. Immediately afterwards.

Q. Was it shut off from your view?

A. A line of box cars did, I think.

Q. Where was the first stop you made that day in Enid?

A. At the water tank.



Q. How clear is your recollection of them stopping at the water tank?

A. Positive.

Q. Where was the next stop?

A. At the station.

Cross-examination.

By Jno. C. Moore:

Q. You say you are positive you stopped at the water tank?

By the Witness:

A. Yes, sir.

Q. Can you remember it distinctly or as a custom that you were in the habit of stopping there?

A. I remember it distinctly.

351 Q. That train usually stopped at the water tank?

A. I cannot say it did at that time; it does now. But there was a time when we didn't stop there for water.

Q. In those days you didn't usually stop there for water?

A. No, sir; well, I am not so sure about that.

Q. You say you are sure you stopped at the water tank on that day?

A. I am positive we stopped at the water tank on that day.

Q. And as you stopped at the water tank the cars came up between you and this man that was killed?

A. No, sir, the cars were there all the time.

Q. And as you pulled from the water tank to the station you got out of sight of where the man was killed?

A. No, sir, I was out of sight when we stopped at the water tank.

Q. You didn't actually see the occurrence, then, did you?

A. I did.

Q. I will ask you if you can tell now in which direction the man that was killed was walking?

A. He was walking north.

Q. Where?

A. Between the rails of track two, I believe.

Q. Wasn't he really walking north-west?

A. He was walking directly down this track at the time I saw him.

Q. Directly north?

A. Yes, sir.

Q. Did you see him step over either of the rails before he was struck?

A. I did not.

352 Q. Did you see him struck?

A. I did.

Q. Will you have the kindness to stand up and point out the place where he was struck as near as you can on your body?

A. (Standing and indicating) I believe he was struck right in the small of the back, would be my idea about it.

Q. How far were you away from him?

- A. Possibly thirty feet at the time.
- Q. You believe he was walking straight along in the center of the track?
- A. He was.
- Q. Did you state how far away from him the cars were that struck him when you first saw them?
- A. To the best of my judgment they were about a car's length.
- Q. About forty feet?
- A. Forty feet, possibly.
- Q. And they ran that distance upon him while he was still walking in the center of the track?
- A. They did.
- Q. How many feet did he walk in the center of the track after you saw the cars approaching him?
- A. That would be very hard to say; very few steps, possibly one or two or three.
- Q. I will ask you if you saw him enter upon that track?
- A. I did not.
- Q. The first you saw of him was when he was in the track?
- A. It was.
- Q. In the center of it?
- A. Yes, sir.
- 353 Q. And walking north?
- A. Walking north.
- Q. And the car was coming behind him; did he seem to be conscious of the approach of the car?
- A. He was not.
- Q. Did you see any signals given by any of the brakemen on this approaching car?
- A. I did.
- Q. Did you hear any sounds?
- A. I heard the hallow.
- Q. How many times did you hear them hallow?
- A. They were continually hallowing until he was struck.
- Q. Did you notice him stop before he was struck?
- A. No, sir.

By Jno. C. Moore: "That is all."

Redirect examination.

By W. H. Moore:

Q. You said you had a distinct recollection of stopping at the water crane that night; what is it that impressed it on your mind?

By the Witness:

A. Our Conductor came by the car while we were stopped and I told him of the accident at the time. He was on his way to the station to get orders at the time.

By W. H. Moore: That is all.

Witness excused.

354 V. J. REEMS, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. State your name?

By the Witness:

A. V. J. Reems.

Q. Where do you live?

A. El Reno.

Q. What is your business?

A. Fireman for the Rock Island.

Q. How long have you been working for the Rock Island?

A. I have been firing since the 20th of January, seven years ago.

Q. Were you employed by the Company before you commenced firing?

A. Yes, sir.

Q. What were you doing?

A. In the B. and B. Department.

Q. How long have you been in the railroad service?

A. About nine and one-half years.

Q. Were you Fireman on engine 2113 with Engineer George Wallace that struck and killed Mr. Turner in the Enid yards on the 28th of July, 1912?

A. Yes, sir.

Q. Tell the jury all you know about it?

A. I was firing engine #2113 on that day, and we had headed into the north end of the yard and pulled a train over the crossing; after that we had some cars to pick up on Number Two track and we backed in there and had just got to work; we could see  
355 up the track and I saw a man walking up between two and three, and all at once he disappeared from my sight and I didn't know where he went to; I thought perhaps he had stepped in the clear between the cars on the other track; I never knew we had struck the man until after the brakeman came to the engine and told us.

Q. That is after the train had been stopped?

A. Yes, sir.

Q. What are your duties on there as fireman?

A. Why, it is to keep the engine hot, and in switching and backing up to look out for signals and to see that the bell is rung.

Q. Was the bell ringing on this occasion?

A. Yes, sir.

Q. You say the man disappeared from your view, what do you mean by that?

A. Out of my sight.

Q. Did you see which way he went?

A. No, sir.

Q. And the next you knew of him he had been run over?

A. Yes, sir.

Q. Did you see the signals given by the brakeman?

A. No, sir.

Q. The first you knew of it was when they told you?

A. Yes, sir.

Q. How fast was your engine moving at the time it stopped or just before it stopped?

A. About eight or ten miles an hour.

Q. Did it attract your attention when the air went on?

A. Yes, sir.

356 Q. How far in your judgment did the train move after the air went on?

A. About four car lengths.

Q. After the train was stopped, did it move again?

A. Yes, sir.

Q. How far?

A. About a car length, I judge.

Q. Back away from the body?

A. Yes, sir.

By W. H. Moore: "That is all."

Cross-examination.

By Jno. C. Moore:

Q. You know Mr. George Kendrick, do you not?

By the Witness:

A. Yes, sir.

Q. He was a brakeman?

A. Yes, sir.

Q. Did you have a conversation with Mr. Kendrick about how the accident happened?

A. No, sir.

Q. Did he never tell you that he hallowed at the man that was on the track?

A. I don't know that he told me; I heard the conversation that he hallowed at the man on the track.

Q. I will ask you if you told Charlie Ballard that if the brakemen had not hallowed at the man he would not have been struck?

A. I don't know the man.

Q. Do you know the bridge gang that has been working here on the coal chutes for the last two days?

A. No, sir.

357 Q. You don't know Charlie Ballard?

A. No, sir.

Q. You didn't say to him that if Kendrick or Portelle had not hallowed at Turner he would not have been killed?

A. No, sir.

Q. Didn't you give that as your opinion?

A. No, sir.

Q. Were you sworn before the Coroner?

A. Yes, sir.

Q. In your testimony before the Coroner did you not say if the brakemen had not hallowed at him he would have passed in the clear?

A. No, sir.

Q. I will ask you when the man disappeared from your sight how it happened that you didn't see him disappear?

A. Because one step either way would have put him absolutely out of my sight.

Q. Did you when you found he had disappeared, give Mr. Wallace a slow up signal?

A. No, sir.

Q. Did you give him a stop signal?

A. No, sir.

Q. Did you inform him of what you had seen?

A. No, sir.

Q. You didn't absolutely see him turn in either direction?

A. No, sir.

Q. You didn't see him step on track Two?

A. No, sir.

Q. What was there on track 3 that would obstruct your view?

A. Nothing.

358 Q. If he had gone over on to Track 3, he would still have been in your sight?

A. No, sir.

Q. But still there was nothing to obstruct your view?

A. Not to obstruct my view where he was at.

Q. I understand you——

A. Number Three was full of cars; the way the man was walking between the tracks he was in my sight, but he could come to an opening any place there and step between two cars and be out of sight.

Q. Did you do anything to give him a signal that you were approaching?

Q. No, sir, only to ring the bell.

Q. Did he seem to be noticing the fact that you were ringing the bell?

A. I could not say as to that; he was walking right down the track.

Q. How long had you been with your engine in the south end of the yard?

A. I don't know; just a short time, after we arrived in Enid; I believe ten minutes would cover it.

Q. "24" came in after that?

A. Yes, sir.

Q. Was there any other engine or cars down in that part of the yard, south, then?

A. Cars, but no engine.

Q. There was no other engine down in that part of the yard?

A. No, sir.

359 Q. Can you remember where there were cars in that part of the yard?

A. There was cars on the passing track. There was a cut-off shoved in on the passing track, and there was cars on Number One about opposite from the cut that was on the passing track.

Q. Up near the freight depot?

A. Up in that way. And, there was cars on Number 3 still on in the yard.

Q. Still farther north?

A. No, east.

Q. I mean farther north than these other cars on the house track and track two?

A. I would not say for sure there was cars in there, but how many I don't know. There was cars right along the side of us.

Q. That is up in front of the freight house?

A. I don't know whether they were up that far or not.

Q. Where did this accident take place with reference to the freight house?

A. About opposite the north end of the freight house.

Q. Was there any cars there?

A. I think that was about the end of the cars on Number 3 and the two cuts on Number 2 and the passing track. There was an opening clear across to the main line.

Q. So there were no cars on No. 3 north of the point where Turner was killed?

A. I don't know.

Q. Did you notice any cars on the track known as the house track?

A. Well, there is two or three different house tracks down there.

360 Q. On that particular track that is first east of the freight depot, did you notice any cars?

A. I don't know; we had not been in there and I don't know, but I judge there was.

Q. You passed down on the passing track?

A. Yes, sir.

Q. Two tracks farther east?

A. Yes, sir.

Q. You cannot remember whether there was any cars on the house track or not?

A. No, sir, I could not say.

Q. There was not any on the main track?

A. No, sir.

Q. There were those on the passing track that you had put there?

A. Yes, sir.

Q. Were there any others in that locality?

A. There was cars on Number Two and on across on Three.

Q. I am talking about the passing track; there was no cars there except what you had put there?

A. Yes, sir.

Q. On track One was there any cars?

A. Yes, sir.

Q. Where?

A. Near the south end of Number One.

Q. How far is the south end of Number One where it finally reaches the main line through the lead?

A. I don't know; about 120 feet, something like that, clearance.

361 Q. Were there any cars on Track 2 as you were proceeding up?

A. Yes, sir.

Q. How far ahead of you?

A. Down near the crossing, north of the depot.

Q. That is over to the north?

A. Yes, sir.

Q. It was after a car of that kind that you were going?

A. Yes, sir.

Q. How far distant from you was that car from where the accident happened?

A. I don't know.

Q. It was a good ways, was it not?

A. Yes, sir.

Q. And you were moving with a good deal of celerity and speed, were you not?

A. No, sir.

Q. How far did you say your train ran after the air was put on?

A. About four car lengths.

Q. What is the length of a car of that estimate?

A. An average car will run about 35 or 40 feet.

Q. So it ran about 160 feet, do you think?

A. I don't know; about four car lengths would be my judgment.

Q. That was as far as the length of your train was it not?

A. Yes, sir.

Q. When the engine came to the stop were you on the engine?

A. Yes, sir.

Q. Did you see Portelle?

A. After the engine came to a stop; yes, sir.

362 Q. Did you hear him tell Mr. Wallace that you had run over a man?

A. Yes, sir.

Q. Was Kendrick there at the time?

A. I don't know.

Q. Had the engine come to a stop at that time?

A. Yes, sir.

Q. How far were you away from the body of Turner?

A. About fifteen feet, I think.

Q. Which way?

A. North of him.

By Jno. C. Moore: That is all.

Redirect examination.

By W. H. Moore:

Q. How long was it after you said this man disappeared from your sight when you felt the air come on?

By the Witness:

A. I could not say exactly, but it was a very short time, almost instantly.

Q. Was it seconds or split seconds?

A. I don't hardly know, but I would judge in less than twenty seconds, may be sooner.

By W. H. Moore: That is all.

Witness excused.

363 CHARLES S. YEATON, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

Direct examination.

By W. H. Moore:

Q. What is your name?

By the Witness:

A. Charles S. Yeaton.

Q. What is your business?

A. Supervisor of Locomotive Operation for the Rock Island.

Q. How long have you been in the service of the Rock Island Railroad?

A. Since 1884.

Q. How long have you been in the railway service?

A. Since 1879.

Q. What has been the character of your employment during that time; what positions have you held?

A. From fireman to engineer, and General Foreman at Caldwell, Kansas, and Road Foreman of Equipment and the present position.

Q. How long were you in the road service?

A. From 1884 until 1905.

Q. At present you are located at El Reno?

A. Yes, sir.

Q. Can you tell us the length of Engine #2113?

A. Between sixty-eight and sixty-nine feet.

Q. That is, over all, from the point of the pilot?

A. Yes, sir.

Q. That includes the tender?

A. Yes, sir, engine and tender.

364 Q. About what is the length of a box car; what are the lengths that box cars run?

A. They run from 40 to 45 feet over all; that is including both draw-bars.

Q. What is the length of flat cars, over all?

A. They run from 33 to 38 feet, over all.

Q. Have you had any experience in stopping engines in service?

A. Yes, sir.

Q. I will ask you if you have had occasion to make any test to



see in what distance a 2100 engine with two cars attached can be stopped on a level track?

A. I did; yes, sir.

Q. When did you make that test?

A. One day last week at El Reno.

Q. Whereabouts at El Reno?

A. On what is called the out-go track on the Pan-Handle Division, Main Line.

Q. Who was the engineer operating that engine?

A. Engineer George Wallace.

Q. Who was on the stand today?

A. Yes, sir.

Q. Tell the jury the conditions of that test, what the result was and how it was made and all about it?

By Jno. C. Moore: We object as incompetent, irrelevant and immaterial and as self-serving.

By the Court: "Over-ruled."

By Jno. C. Moore: "Plaintiff excepts."

By the Witness:

A. Mr. Wallace was told——

By Jno. C. Moore: I object to the conversation being de-  
tailed.

365 By W. H. Moore: This is the reason for it: The test was made there and he is going to tell what directions were given each person who made that test.

By the Court: Well, he can do that without stating the conversation.

By the Witness:

A. Under perfect conditions, and with a flat car and a box car——

By Jno. C. Moore: I object unless it was engine 2113.

By the Court: Or of similar character and size.

By Jno. C. Moore: I am objecting to the testimony of the witness because it is not shown that a 2100 engine was used at El Reno and at the time of that test was in the same physical condition that 2113 was in at that time.

By the Court: "Over-ruled."

By Jno. C. Moore: "Exception."

By W. H. Moore:

Q. Proceed.

By the Witness:

A. I used a flat car, a box car and a 2100 engine about in the same physical condition as engine 2113 was at the time of this accident——

By Jno. C. Moore:

Q. Before you proceed, I want to ask a question. How do you know it was in the same physical condition of 2113?

By the Court: You can ask that on cross-examination. Over-ruled.

By Jno. C. Moore: "Plaintiff excepts."

366 By the Witness:

A. Mr. Wallace was told what we wanted to do in making this test. I rode on the front end of the engine, starting in back from a point we were to get his speed with a stop watch, telling him to run about the same speed he was running in the Enid yard at the time of the accident as near as he could guess it. He had attained a speed of twelve miles per hour when the stop signal was given; he expected this stop signal, had his hand on the brake when he gave it, and stopped in 121 feet and nine inches.

By W. H. Moore:

Q. From your experience as a road engineer, how would that sort of a stop, made under those conditions, a man sitting there expecting the signal, with his hand on the air, how would that compare with an emergency stop where he got the signal from the brakeman?

A. It might make a difference of forty or fifty feet, or thirty or forty feet.

Q. Tell how that is?

A. Because of the position of the engineer; he would be hanging out of the window backing up and when he got the stop signal he would make a service application and at the next signal he would go to the emergency, and that time intervening would allow him to make thirty or forty feet difference.

Q. Suppose he went immediately to the emergency, would the fact that he was expecting the signal in one instance and not in the other, would that have any influence?

A. No, I would think not, because he is expecting a signal all the time. He is working with the men expecting a signal of some kind.

367 Q. Are you able to tell us whether on the 28th day of July, 1912, engine 2113 was an oil or coal burner?

A. It was an oil burner.

Q. Are you able to tell me what engine was pulling Train 24 on the 28th day of July, 1912?

A. No, sir.

Q. On July 28, 1912, was Engine 806 an oil or coal burner, do you recall?

A. I think a coal burner; I am not positive, but I think it was a coal burner.

Q. Which makes the most smoke, an oil or coal burner?

A. That is according to how they are fired; if properly fired the coal burner would make the most smoke; the oil burner should make no smoke.

## Cross-examination.

By John C. Moore:

Q. Did you participate in the test that you have described at El Reno?

By the Witness:

A. Yes, sir.

Q. Who else besides Mr. Wallace and yourself?

A. The Round House Foreman, Mr. Haman, at El Reno, and Mr. Moore.

Q. Is Mr. Moore the attorney here present?

A. Yes, sir.

Q. What duties did the Round House Foreman perform on that occasion?

A. He helped us measure the distances, and was down there when we got the cars together, helped us couple the cars together.

368 Q. Did he ride on the rear end of the flat car you had attached there?

A. No, sir, he was riding on the front end of the engine with me.

Q. Who was on the rear?

A. Nobody.

Q. You made no signals from the rear of the train?

A. The signals were made by Mr. Moore, who stood at a given point on the ground; it was all lined up before we started to make this test.

Q. Everything was prepared for that test?

A. Yes, sir.

Q. You were backing were you not?

A. Yes, sir.

Q. There was nobody that rode on that advancing car that gave Mr. Wallace the signal to stop?

A. No, sir, it was given directly to the engineer.

Q. From the ground?

A. Yes, sir.

Q. And he was expecting it, of course?

A. Yes, sir.

Q. And was prepared for it?

A. Yes, sir.

Q. And you succeeded in stopping in 121 feet?

A. 121 feet and nine inches.

Q. Did he put on the full emergency brake?

A. Yes, sir.

By Jno. C. Moore: "That is all."

Witness excused.

369 By W. H. Moore: Now, if your honor please, that is the last of the defendant's witnesses. We are going to ask that the jury be permitted to go to the depot and the water crane and the freight depot and see the location of those yards down there; I want them particularly to go to the water crane that has been

mentioned in evidence and to get a view of the yards from the depot and as much more of it as they are interested in seeing.

By John C. Moore: I could not possibly have any objection to that if the situation of the yards were the same as they were that day, but in as much as they cannot possibly — restored to that condition, I cannot see but what it would do a rank injustice to the plaintiff or the defendant, because all the distances have been marked out.

By the Court: Is there any controversy about the place where Mr. Turner was killed?

By W. H. Moore: I think not. And there is a very important matter here on the part of one or two witnesses; the changed positions are the positions of the cars; of course, that will be different; nobody could set the cars back like they were that day.

370 By the Court: If you will take the responsibility of drawing an entry authorized the jury to be sent down to view the premises, I will put them in charge of a Bailiff and send them down.

By W. H. Moore: I think I will do that. I will take that responsibility. Of course, the jury should be instructed by the Court.

By John C. Moore: In drawing that entry, enter the objections of the plaintiff.

By the Court: Yes, sir, do that and enter the over-ruling of the objection by the Court and the plaintiff's exceptions thereto.

By the Court: Gentlemen of the Jury: It has been requested that you be taken to view the premises——

By W. H. Moore: I want the jury taken to the water crane and allowed to view the yards towards the freight depot, if they care to go down there and see the conditions there, and I would be glad to have them do it; in other words, I want them to have a correct idea of those conditions down there and what there is to be seen.

By the Court: Can you agree among yourselves as to the point where Mr. Turner was killed?

By W. H. Moore: My idea is he was killed approximately east of the freight depot on Track Two.

371 By the Court: That is correct, is it, Colonel Moore?

By John C. Moore: I don't know the exact place. All I know about it is from the evidence that has been adduced here.

If the Court please, sincerely, I cannot help but think that this is a grave error, and now night is coming on and the case is not closed and there is more testimony to introduce, and if the jury goes at all they should go in day-light; and then another thing—there is quite an impossibility on the part of the jury to select the location or situation from which the different witnesses testify. Take the plaintiff's witnesses; I don't know until their attention is called to it from the argument or the evidence that they will remember the location of the witnesses——

By the Court: There is no use in arguing it; I am going to send them down there; I don't really see why you object to it.

By John C. Moore: The point is, I fear there might be error in such a procedure.

By W. H. Moore: Is your honor going to have a night session?

By the Court: Yes, sir.

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*Order for Jury to View Premises.*

By the Court: Gentlemen of the Jury: The defendant has requested that you be sent down to view the premises of the Rock Island Railroad from the water crane south; that is, the yards. You will be taken there in charge of two Bailiffs of the Court, and you will be permitted to walk in the vicinity of that water crane, and all of you will use your eyes in looking farther south-west—

By W. H. Moore: Your honor, I will ask that they go to the freight depot and farther if they see fit.

By the Court: No, I will not let the jury have the discretion to go where they please. Gentlemen, you will be taken to the water crane, and from there you will be permitted to look through the yards of the Rock Island Railroad, and then you will be taken from there on track two down as far south as the north end of the freight depot, and you may examine the yards from there, and you will be brought back by the Bailiffs.

And during the time you are in charge and custody of the Bailiffs you will not talk to one another about the case or about what you see or what impression it makes on you; and you will not communicate with any one or allow any one to communicate with you, excepting, the Bailiffs will point out where the water-crane is and then they will conduct you in a body to Track Number Two and down that as far south as the north end of the freight depot, and there  
373 you will stop and make such observations as you see fit, but you will remain together and all try to see the same things, and then you will be brought back and taken to the restaurant by the Bailiffs for supper.

By John C. Moore: I ask that the jury be instructed to make no measurements or step any distances.

By the Court: No, gentlemen, you will not measure any distances and will not step the distances between any points, but will take the evidence on such things as that; you will simply go there in a body and use your eyes in observing and make no calculations by stepping or measuring.

Now the first track is the house track, the second track is the main track and the third track is the passing track, and then the next track is Track No. One and the next Track Number Two. You will remain in charge of your Bailiffs, and when you have made these observations, you will be taken to supper by the Bailiffs and be in your seats in the jury box at 7.30 o'clock this evening.

Thereupon, the Court Bailiffs, Steele and Shepherd, were by the Clerk duly sworn as Bailiffs for the Jury, duly admonished and instructed by the Court, and the Jury retires to view the premises in charge of said Bailiffs.

374 Evening Session, Monday, December 1, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of 7:30 o'clock, p. m., of this day, viz., December 1, 1913, pursuant to recess heretofore taken, with the Honorable James W. Steen sitting as Judge of said Court, and all the officers of the Court, and the parties hereto present, as aforesaid. The jury is present in the jury box in charge of their two sworn bailiffs, and by agreement of counsel for plaintiff and defendant, in open Court, it is admitted by plaintiff and defendant that the jury sworn to try this cause is present in the jury box.

Thereupon, the trial of this cause is resumed and the following proceedings had, viz:

By W. H. Moore: The Defendant has closed.

Thereupon, the plaintiff, to maintain the issues upon his part, after the plaintiff and defendant have each introduced their evidence in chief, and rested, offered and introduced the following evidence, viz:

375 F. H. WALLACE, a witness, of lawful age, having been first duly sworn, and being re-called as a witness in rebuttal upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. Mr. Wallace, as Chief Clerk of the freight office in Enid, when you received the coal tickets and made the record in regard to them, what did you do with them?

By the Witness:

A. They were forwarded to Chicago.

By John C. Moore: That is all.

Witness excused.

376 W. M. HUTCHINSON, a witness, of lawful age, having been first duly sworn, and being re-called as a witness upon the part of Plaintiff, in rebuttal and further cross-examination, testified as follows, to-wit:

Examination by John C. Moore:

Q. Mr. Hutchinson, when Mr. Turner came to you at the cinder pile, as you testified today, and conversed with you about whether you had coal enough to run until Monday evening, and you heard the train whistle, what did he say and do?

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial and not proper rebuttal testimony.

By the Court: Sustained.

By John C. Moore:

Q. You testified that he came and wanted to know if you had coal enough to do until Monday evening?

By the Witness:

A. Yes, sir.

By W. H. Moore: We object as incompetent, irrelevant and immaterial, not proper rebuttal testimony and repetition.

By the Court: Are you re-calling him for your witness or for further cross-examination?

By John C. Moore: I am calling for further cross-examination.

377 By the Court: Why don't you announce it?

By John C. Moore: I could not call him before they rested.

By the Court: Yes, you could; that is the proper time to call him.

By Jno. C. Moore: I want to ask to re-call him to the stand for further cross-examination.

By the Court: Then for that purpose, the Court sets aside the order of rest and permits the witness now on the stand to be recalled as a witness of the defendant to be further cross-examined by plaintiff.

By John C. Moore:

Q. Now, Mr. Hutchinson, when you heard the train whistle—

By the Court: The only way that that can go in is by asking for all of that conversation, of which they have introduced a part.

By W. H. Moore: The defendant objects as incompetent, irrelevant and immaterial.

By the Court: Over-ruled.

By W. H. Moore: Exception.

378 By John C. Moore:

Q. You may state what else Mr. Turner said and did at that time?

By the Witness:

A. Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think I would. And he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said "There is '24'; I must go to the freight depot and take my coal tickets and order coal for the chutes." Then he turned around and walked off towards the freight depot.

By John C. Moore: That is all.

By W. H. Moore: That is all.

Witness excused.

By the Court: Now, does the defendant rest?

By W. H. Moore: Yes, sir. We rest.

By the Court: Now, we are on the balance of the rebuttal; the defendant has rested.

379       GEORGE MCBLAIR, a witness, of lawful age, being first duly sworn by the Clerk, and being re-called as a witness upon the part of plaintiff, in rebuttal, testified as follows, to-wit:

Examination by John C. Moore:

Q. Your name is Earnest McBlair?

By the Witness:

A. Yes, sir.

Q. Did you go away from here on Train "24" on the 28th day of July, 1912, at Enid?

A. Yes, sir.

Q. Did that train take water anywhere that day?

A. It took water at North Enid.

By John C. Moore: That is all.

By W. H. Moore: That is all.

Witness excused.

380       EARNEST MCBLAIR, a witness, of lawful age, being first duly sworn by the Clerk, and being re-called as a witness upon the part of plaintiff, in rebuttal, testified as follows, to-wit:

Examination by John C. Moore:

Q. Earnest, did you leave Enid on the evening of July 28th, 1912, on Train #24?

By the Witness:

A. Yes, sir.

Q. Where did that train take water?

A. At North Enid.

By John C. Moore: That is all.

Witness excused.

By John C. Moore: The plaintiff rests.

And this was all the evidence in the case.

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*Motion for Verdict.*

By Mr. Gamble: Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, and moves the Court to instruct the jury to return a verdict in this case in favor of the defendant, and for grounds in support of said motion assigns the following:

First. That the testimony and evidence in this case together with all the lawful inferences which may be drawn therefrom, is insufficient to sustain a recovery in favor of the plaintiff and against the defendant in this case.

Second. That no sufficient testimony has been adduced in this case to sustain a recovery in favor of the plaintiff and against the defendant, whereof the defendant prays judgment of the Court.



By the Court: Gentlemen of the Jury: You have now heard all the evidence in the case of both plaintiff and defendant, but there yet remains for you to hear the instructions of the Court and the argument of counsel. You will be excused until tomorrow morning (Dec. 2, 1913) at nine o'clock, and in the mean time, remember the admonition of the Court heretofore given you not to talk about the case on trial either among yourselves or with any other person and ~~do~~ not remain in the presence or hearing of any person discussing the case; it also becomes important for you to refrain from making up your minds definitely as to any phase of the case, because you yet have to hear the law governing the case and the argument of counsel, and counsel may aid you materially; and the instructions of the Court may give you ideas when you come to apply it

382 to the facts that may change your views in some particulars from what they might be now. At all events, it becomes your duty not to come to any definite conclusion until you have heard all the evidence, the instructions of the Court and the arguments of counsel.

The law recognizes the charge of the Court and the arguments of counsel as just an important part of the trial as the evidence, and you should refrain from making up your minds definitely and be in such state of mind as to give what is to come afterwards the same force and effect as the other that you have heard. You may now retire while we determine certain legal matters that are to be taken up with the Court that may not be proper for the jury to hear.

Thereupon, the jury sworn to try the issues in this cause retire from the court room.

Thereupon, the court hears the arguments of counsel for plaintiff and defendant on the motion for an instructed verdict.

By the Court: The motion will be over-ruled and an exception allowed.

By Mr. Gamble: "Defendant excepts."

Thereupon, by order of Court, the District Court of Garfield County, State of Oklahoma, takes a recess until the hour of nine o'clock tomorrow morning, viz., December 2, 1913.

### 383 Morning Session, Tuesday, December 2, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of ten o'clock a. m. of this day, Tuesday, December 2, 1913, with the Honorable James W. Steen sitting as Judge of said Court, and all the officers of the Court and the parties hereto all present, as aforesaid, counsel for both parties being present. The Jury sworn to try the issues in this cause is present in a body in the jury box, and by order of Court, the jury is polled by the Clerk of the Court and each juror answers "Present" as his name is called, and they are all present.

Thereupon, the trial of this cause is resumed and the following proceedings had, viz:

By the Court: Gentlemen of the Jury, you will now listen to

the reading of the Instructions of the Court, stating the law of the case.

Thereupon, the Court instructs the Jury in writing, in open court in the presence and hearing of the Jury and the parties hereto, which said Instructions are in the words and figures following, viz:

384 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Defendant.

*Instructions to the Jury.*

GENTLEMEN OF THE JURY: You are instructed that this action is brought under and by virtue of an Act of Congress of the United States, commonly called the Employer's Liability Act. The plaintiff in his petition states that he is the Administrator of the Estate of William L. Turner, deceased, and that he brings the suit for the benefit of the widow and children of the said deceased Turner. He sets out their names, ages and residence, and alleges that said Turner departed this life on the 28th day of July, 1912, at Enid, Garfield County, Oklahoma, at a time when the defendant, Chicago, Rock Island and Pacific Railway Company was a common carrier by railroad between certain states of the United States, and that said Turner was an employe of said defendant Railway Company, and was performing an act of inter-state commerce for said Company, when through their carelessness, negligence and unlawfulness, without fault or negligence on his part, he was run over and killed by said Company in their switch yards in the City of Enid, Garfield County, Oklahoma.

He sets out with great particularity the situation of the yards, the duties of deceased under the contracts of his employment, the acts

385 he was performing when killed, and the circumstances of negligence on the part of the defendant Railway Company, and alleges that same occurred within the corporate limits of the City of Enid, Oklahoma; that the train which killed the said Turner was proceeding within said limits in excess of the speed limits prescribed by ordinance of said City, and that said train was being run at the time in violation of a statute of the United States, in that the train power brakes with which it was equipped were not used or operated by the engineer from the engine pushing said train, and that all the causes of negligence thus alleged were the proximate and sole causes of the killing of said Turner.

2. The defendant Railway Company for its answer denies each, all and singular the allegations of the petition of plaintiff, except, that it admits that it is a corporation organized and existing under

and by virtue of the laws of the states of Illinois and Iowa, having its principal office or place of business at the City of Chicago, in Illinois, and having and operating a line of railway into and through the State of Oklahoma and into and through the County of Garfield therein.

It expressly denies that the said Turner received his injuries in the manner alleged, and states that if he received injuries which caused his death that such injuries were directly due and proximately caused by the negligence and want of care on the part of said Turner, and that the said injuries to and death of the said Turner were not contributed to or caused by the negligence or want of care on the part of the defendant.

That for a separate defense it states that if said Turner received the injuries from which he died, as alleged, that he, the  
386 said Turner, was guilty of negligence and want of care directly and proximately contributing to his alleged injuries and death in this: That on the afternoon of July 28, 1912, at about the hour of five o'clock, he was walking between the tracks two and three in the yards of the Company and was in a place of safety; that while so walking and being in a place of safety, did fail to exercise ordinary care for his own safety before leaving his place of safety and did step upon track two in the said yards, immediately in front of an advancing and approaching train, by which he was struck and knocked down, sustaining the injuries which resulted in his death; that the said inattention, negligence and want of care on the part of said Turner directly and proximately contributed to his injuries and death.

3. The plaintiff has filed a reply to the defendant's answer in which he denies all allegations of negligence on the part of deceased, William L. Turner.

You are, therefore, instructed that there is no allegation either in the petition, answer or reply, but what is denied, except the admission that the defendant is a railroad corporation of Illinois and Iowa, and has and operates a line of railway into and through Oklahoma and Garfield County. This one admission is the only fact on which no evidence is taken, and will in your deliberations, be taken as absolutely true.

4. You are instructed that the burden of proof is upon the plaintiff to prove the allegations of the petition by a fair preponderance of the evidence.

5. By a "preponderance of the evidence," as used in these instructions, does not mean the greater number of witnesses alone, but it is that evidence which best satisfies and convinces you of its truthfulness.

387 6. You are further instructed that the burden is upon the plaintiff, not only to prove defendant's negligence, but that he must also prove that such negligence was the cause of the injuries.

7. You are further instructed that the happening of the accident which caused the death of W. L. Turner raises no presumption of negligence or wrongful act of the defendant.

8. The Court instructs the jury, that before the plaintiff is entitled to recovery in this case he must prove by a preponderance of the evidence that the death of William L. Turner was the direct and proximate result of some one or more of the acts of negligence alleged in plaintiff's petition.

9. You are instructed that the admission of defendant railway company of having and operating a line of railway into and through the State of Oklahoma, is an admission that it is a common carrier by railroad and engaged in inter-state commerce. Now, if you believe from the evidence that the deceased, William L. Turner, was an employe of said defendant Company at the time he was killed, and that he was then and there engaged in doing an act of inter-state commerce for said Company when killed, that he was not guilty of any negligence at that time, and that the negligence of the defendant Company was the sole cause of his death, then your verdict should be for the plaintiff. On the other hand, if you believe from the evidence that the defendant Company was not guilty of any negligence, and that the injury to and death of said Turner was wholly caused by his own negligence, then your verdict should be for the defendant.

No. 9. Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

388 10. If you believe from the evidence that the deceased, William L. Turner, was an employe of the defendant Company, and was in the act of performing a duty of inter-state commerce for said Company when killed, and you further believe that both he and the said Company were guilty of contributory negligence, without which he would not have been killed, then your verdict must be for the plaintiff; but you shall diminish the damages in proportion to the amount of negligence attributable to said Turner. Provided, however, that if you believe from the evidence that the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same, and that such failure contributed to the injury and killing, then you shall not hold the said Turner as being guilty of any contributory negligence, and shall not diminish the damages from that cause.

No. 10. Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

11. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen.

No. 11. Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

12. Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as approximate cause thereof, without which the injury would not have occurred.

No. 12. Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

389 13. The conduct of the deceased, Turner, must be subjected to the same test of reasonable prudence and caution in the exercise of due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances; so, if he was familiar with the switch yards and their dangers; that he frequently used them at work and labor therein and in crossing and re-crossing them, and knew how to act in so doing to protect himself, and was trained and familiar with railroad signals and knew how to interpret them, and that under the special circumstances if he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted to take some precaution that a prudent man ought to have taken, whereby he lost his life, he was guilty of contributory negligence. He should approach cautiously and carefully, should look and listen, and do everything that a reasonably prudent man would do before he attempted to cross over the track where he was killed; scrutinizing his actings and doings under the light of the then situation, the nature and character of the way he was going, the fact of the difficulty of observation, if any, the time of day and the probability of danger from passing trains, the fact that there were other tracks side by side, that another train on one of these was actually approaching and passing, the noise and confusion, and every fact and circumstances bearing on the case to influence his conduct then and there, under those circumstances and not under any other circumstances, and say upon your fair and impartial judgment whether he acted as a reasonable and prudent man should have acted and with the due care and caution demanded by the exigencies of the occasion.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

390 14. (Note: No number 14 instruction was given perhaps due to a mistake in numbering.)

15. You are instructed that the knowledge of the servant of the railroad company of the danger of accident when apparent, is the knowledge of the Company within the meaning of the law, and the acts of the servant under such circumstances are deemed to be the acts of the Company itself.

No. 15. Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

16. You are advised that a common carrier by railroad is engaged in inter-state commerce when running its trains from one state to another, and that all trains which cross the line between two states are inter-state trains, and their crews are called train crews, and are engaged in inter-state commerce. That this character attaches to each of such trains in all parts of its journey until it reaches its final destination. That all such trains are required to be equipped with train power brakes, and that in the running of such trains such power brakes must be used and operated, and failure so to do is violation of an express Statute of the United States. That during the progress of such train, if it becomes necessary for it to leave cars at a station, or take on cars, that such operations do not take from it its character of an interstate train, nor change its crew from being a train crew. That the duty remains in all parts of its operations to use and operate its train power brakes until it reaches its destination.

No. 16. Given by the Court and excepted to by the defendant  
JAMES W. STEEN, *Judge*.

391 17. You are instructed as a matter of law, that in any train engaged in inter-state commerce, operated by any common carrier by railroad, that not less than eighty-five per centum of the cars in such train shall have their cars equipped with train power brakes, and in running any such train they shall have their train power brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in such train which are associated together with said eighty-five per centum shall have their brakes so used and operated; that this is a matter of Statute by the United States, and the Court instructs the jury that to operate a train which is required to be so equipped, and which is so equipped, without using or operating such power train brakes is in violation of the Statute of the United States.

Given by the Court and excepted to by the defendant.  
JAMES W. STEEN, *Judge*.

18. You are instructed that though you may believe from the evidence that Turner was guilty of contributory negligence at the time he was killed, yet if you believe that the engine and cars which ran over him and killed him were run by the defendant railway company in violation of any Statute of the United States, and that such running of said engine and cars in such violation of such statute contributed to the killing of said Turner, you shall then not hold said Turner guilty of contributory negligence, and the damages you shall find, if any, shall not be diminished by you by reason of his contributory negligence.

Given by the Court and excepted to by the defendant.  
JAMES W. STEEN, *Judge*.

392 19. (Note: No instruction numbered 19 was given, due to the fact that same was withdrawn by the Court after numbering, but before reading same to the Jury.)

20. You are instructed that if in any contract, rule, regulation or device whatsoever, it may have been made to appear to you that the purpose and intent of said contract, rule, regulation, or device whatsoever, shall be to enable the defendant company to exempt itself from any liability for such injury, that you shall not consider such contract, rule, regulation, or device whatsoever, as contained in any contract of employment, but shall consider such portion of such contract as being void and forbidden by law.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

21. The Court instructs you that the labor and work of shoveling coal into the pockets of the coal chutes of a railroad company engaged in inter-state commerce, for use of its engines, a portion of which are engaged in inter-state commerce, making reports to the company of the cars unloaded, turning in coal tickets which show the amount of coal taken from the chutes by such engines, and ordering coal set on the chutes in cars for unloading into the pockets, are all acts contributing toward inter-state commerce, and that the person doing such things when doing them is engaged in inter-state commerce within the meaning of the law. If you believe from the evidence that the deceased, Turner, was going to the freight house of the defendant Company, either to turn in his coal tickets or to order coal set on the chutes for unloading, or both, when he was killed, then he was at the time engaged in inter-state commerce; unless, you find and believe from the evidence that the deceased, Wm. L. Turner, prior to receiving the injuries which caused his death, had gone to the east side of the defendant's yards at Enid, upon his own business, and not in the discharge of any duty which he owed the defendant, and that he was killed while crossing the  
393 yards, and before he had performed or was performing any duty to defendant, then your verdict should be for defendant; and the mere fact that before starting to cross the yards he stated that he was going to turn in his coal tickets and order coal for the chutes, would not be sufficient to constitute him an employee of the defendant at the time of his death.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

22. You are instructed that the mortality tables of American experience in expectancy of life may be considered by you in determining how many years the deceased, William L. Turner, might have lived had he not been killed, and such expectancy may be considered by you as an element in measuring damages in this cause; provided, your verdict shall be for the plaintiff; and another element you may consider in measuring such damages is the evidence of his earnings, annually, monthly or weekly, as the same may appear to you. But you are advised that both of these elements will



not justify you in finding any sum whatever for the plaintiff, and that before you can do so you must determine from the evidence how much he contributed to the support of each one dependent upon him, or to whose support he contributed, and the sums he contributed, either annually, monthly, weekly or otherwise as it appears to you from the evidence, and the periods of time each should expect the continuation of such sums had he not been killed. From these elements separately you may determine what sums he would have contributed had he not been killed, and the aggregate of such sums maybe considered by you in determining the sum of damages suffered by all of the beneficiaries. In determining how long contributions might be expected from him to those dependent upon him you may take into consideration his legal duty to support each of the beneficiaries.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

394 23. If your verdict is for the plaintiff, and you believe that the widow, Ida M. Turner, as a beneficiary, would in the course of nature live longer than the deceased, William L. Turner, would have lived had he not been killed, then you may consider his expectancy of life as an element of the damages she has suffered; that is an element in the calculation of the damages she has suffered, and you may also consider the annual, monthly or weekly allowances she had been accustomed to receive from him for her own use, and from these you may determine the sum that she has been deprived of and will be deprived of by reason of the same being stopped by his death. You are not to consider her mental anguish, loss of companionship or advice, nor any element of damages but the sums of which she has been deprived, and which she has been accustomed to receive from him.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

24. If your verdict is for the plaintiff, you may consider the age of each child who is named as a beneficiary in this action at the time said William L. Turner was killed, and as an element and measure of damages to each child, you may consider the time to elapse until such child is by law emancipated from the control of its parents; and as a further element and measure of the damages sustained by each child, you may consider the annual, monthly or weekly allowances appropriated out of his funds and contributed by him to the support of the family, as the evidence may disclose, and from the facts thus obtained by you, you shall determine what damages each of said children have sustained by being deprived of such allowances, and after determining the same, you shall make return, along with your verdict, of such sums separately to each child by name, and also to the widow.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.



You are advised by the Court that no one is entitled to judgment for any sum unless it be shown that the deceased was accustomed to make provision for such one, and that this applies to all persons whomsoever. If any persons' names appear in the suit as beneficiaries, and no such evidence is adduced to show contributions to such persons, you shall make return of the fact that you do not allow any such claimant any sum whatever.

25. If your verdict is for the plaintiff, and you have determined the sum you shall allow to each beneficiary, you may then add the amounts together to make one sum, and may make up your verdict for such total sum and accompany the same with the separate allowances to the beneficiaries by name and return the same into court with your general verdict.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge*.

Forms of verdict suitable to this instruction will be furnished you.

26. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in starting its engine No. 2113, and the cars attached thereto, backing on track two, while train No. 24 was coming in on the main track, and very near to it, with the tracks running parallel, as alleged in sub-division A of paragraph ten of his petition.

27. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in starting and running its engine No. 2113 and the cars attached thereto upon track two, while No. 24 was coming into the yards on the main line, as alleged in sub-division B of paragraph ten of his petition.

396 28. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the death of William L. Turner was occasioned by the negligence of the defendant in failing to give the blasts from the whistle prescribed by the rules of the Company, as alleged in sub-division C of paragraph ten of his petition.

29. The Court instructs the jury that a verdict against the defendant in this case would not be justified upon plaintiff's allegation that defendant neglected to ring the bell and sound the whistle frequently while backing engine No. 2113, as alleged in sub-division D of paragraph ten of his petition.

30. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in continuing to back engine No. 2113 with the cars attached thereto before train No. 24 came to a stop, as alleged in sub-division E of the tenth paragraph of his petition.

31. The Court instructs the jury that it cannot find a verdict for the plaintiff in this case upon the allegation that the defendant was negligent in commencing to back engine No. 2113, and continuing to do so at a time that its signals, if given, were likely to be co-mingled with those of No. 24, and to be incapable of being

understood, thus causing confusion in the interpretation and endangering those who might be near, as alleged in sub-division F of the tenth paragraph of plaintiff's petition.

32. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the death of William L. Turner was occasioned by the fact that the signals of the moving train were intermingled with those of train No. 24, and were misunderstood, as alleged in sub-division G of the tenth paragraph of the plaintiff's petition.

397 33. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in failing to signal the deceased Turner, when said deceased was seen walking between tracks No. 2 and No. 3, to notify him of the presence and approach of the train, as alleged in sub-division H of the tenth paragraph of plaintiff's petition.

34. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the fireman in the cab with the engineman did not have the engine slowed or stopped when he saw the deceased entering on track two, until he should see that he had safely passed in the clear, as alleged in sub-division J of the tenth paragraph of Plaintiff's petition.

35. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the brakeman on the flat car when he saw the deceased entering on track two, negligently failed to signal the engineer to stop, or go slow, until he could see that the deceased was in the clear, as alleged in sub-division K of the tenth paragraph of plaintiff's petition.

36. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman did not have in his hands any flag or other device for signaling the engineer or fireman, as alleged in sub-division L of the tenth paragraph of plaintiff's petition.

398 37. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman upon the flat car which struck deceased, was out of sight of the engineer so that signals could not be seen, if made, as alleged in sub-division M of the tenth paragraph of plaintiff's petition.

38. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman waited to give the signal until the deceased was in imminent peril and that instead of giving the train signal he gave a loud and piercing yell, which caused Turner to stop and throw himself in a position where he could not escape injury, as alleged in sub-division N of the tenth paragraph of plaintiff's petition. Unless, you believe that the acts of the brakeman were not the acts of an ordinarily prudent man, considering the surrounding circumstances as they appear from the evidence.

Given by the Court and excepted to by the defendant.

JAMES W. STEEN, *Judge.*

39. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the engineer on engine No. 2113 was running his train at a high rate of speed and in not using the train power brakes by which he might have controlled its speed, or have stopped it when signaled to do so, as alleged in sub-division O of the tenth paragraph of plaintiff's petition.

No. 39 was offered by defendant, and given by the Court, but afterwards by the Court withdrawn from the jury, to which defendant excepted, as will appear in "Requested Instructions" and in defendant's motion for a new trial.

399 40. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the Statute of the United States, as alleged in sub-division P of the tenth paragraph of plaintiff's petition.

41. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that it ran its train in the switch yards at Enid without ringing the bell and sounding the whistle, as alleged in sub-division Q of the tenth paragraph of plaintiff's petition.

42. The Court instructs the jury that the plaintiff cannot recover in this case upon his allegation that the defendant was negligent in that the engineer when he found that his brakeman was not in sight, did not stop his train and require the brakeman to keep in sight so that signals might be seen, as alleged in sub-division R of the tenth paragraph of plaintiff's petition.

43. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the train crew, operating engine No. 2113, had abundant opportunity to save the life of the deceased, Turner, but negligently failed to do so, as alleged in sub-division S of the tenth paragraph of plaintiff's petition.

44. The Court instructs the jury that if they find and believe from the evidence in this case that the direct and proximate cause of the death of William L. Turner was his own negligence, inattention or want of ordinary care, that its verdict must be for the defendant.

400 45. The Court instructs the jury that one, while near or upon a railroad track is required to exercise due care for his own safety and before placing himself in a position of danger, is required to look and listen for approaching trains, and if he fails to so look or listen and is killed or injured by reason of such failure and without negligence on the part of the Railroad Company, he is not entitled to recover.

46. The Court instructs the jury that if they find and believe from the evidence that immediately prior to receiving the injury, which caused his death, the deceased, William L. Turner, was walking between tracks No. 2 and No. 3, in the switch yards at Enid, and that without looking or listening for an approaching train he stepped from a position of safety to one of peril and was killed, then your verdict must be for the defendant; unless, you further find that after he

reached a position of peril, and such peril was discovered by the employes of the Railroad Company, said employes failed to use the care and caution that prudent persons would use under the same circumstances to avert the injury.

47. The Court instructs the jury that whether said William L. Turner, deceased, was in the yards of the defendant at the time of his death as an employe or licensee, that by going there he assumed the risk of the peril incident to his position from the proper and customary use and operation of said yards and it was his duty, in order to protect himself from said peril, to take such care and precaution as reasonably prudent persons would exercise under the same or similar circumstances.

401 48. The Court instructs the jury that in determining whether or not the employes of the railroad company were guilty of negligence after the peril of the deceased was discovered, it is your duty to take into consideration the facts and circumstances surrounding them at the time. The opportunity or lack of opportunity for deliberation and the care that is required of them by law is such as reasonably prudent persons would have exercised under the same stress and strain of excitement, if you find the circumstances were such as to produce such excitement.

49. Any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains; and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening, he is guilty of negligence.

50. A person approaching, or going upon or near, a railroad track upon which trains are in the habit of running, is bound by law to look and listen, and listen for approaching trains, providing that he has any reason to believe that there may be such approaching; and the fact that he was an employe did not release him from the necessity of exercising reasonable care under the circumstances for his own safety. He had the right to rely wholly upon the railroad company for protection from passing trains or cars.

402 51. You are instructed that in this case nine or more jurors concurring may return a verdict for or against either party to the action, but in case a less number than twelve join in the verdict, it will be necessary for those concurring therein to sign the same; but in case your verdict is unanimous, then it need be signed by your Foreman only.

52. You are the sole and exclusive judges of the facts in the case, the credibility of the witnesses and the weight to be given their testimony. If you find and believe that any witness has sworn falsely to any material fact in the case, you have the right to disregard the whole or any part of such witness' testimony.

You have heard all the evidence in the case, the Instructions of the Court stating the law of the case, and will now listen to the argument of counsel for plaintiff and defendant giving their respective theories of the case, and will give such arguments careful and conscientious consideration in-so-far as in your judgment they are based on the law and the evidence, at the conclusion of which

you will be placed in charge of a sworn Bailiff and by him conducted to your jury room for deliberation. When you retire thereto, you will select one of your number to act as Foreman, and when you have agreed upon a verdict you will sign the same as directed in these instructions and return it into Court.

JAMES W. STEEN, *Judge*.

Filed Dec. 2, 1913. Geo. M. Scifres, Clerk District Court.

403

*Requested Instructions.*

Thereupon, and on the same day, to-wit, December 2, 1913, and before the Court had instructed the jury, as aforesaid, the Defendant asked the Court to give to the jury the following instructions, which said instructions were refused by the Court and exceptions allowed the defendant, and which are in the words and figures following, viz:

Defendant's requested Instruction No. 2:

The Court instructs the jury that under the law and the evidence in the case, its verdict must be for the defendant.

Offered by defendant, refused by the Court, and exceptions allowed.

JAMES W. STEEN, *Judge*.

Defendant's requested Instruction No. 11:

The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that, when deceased was seen to be about to enter on track two, it negligently failed to signal him in some effective manner that he might become aware of the approach of said train before entering in a position of danger, as alleged in sub-division I of the tenth paragraph of plaintiff's petition.

Offered by the defendant, refused by the Court and exceptions allowed.

JAMES W. STEEN, *Judge*.

404

Defendant's requested instruction No. 22:

The Court instructs the jury that under the evidence in this case, the deceased, William L. Turner, at the time of his death was what is known as an independent contractor, and was not at said time an employe of the defendant engaged in inter-state commerce within the meaning of the law, and its verdict must be for the defendant.

Offered by the Defendant, refused by the Court, and exceptions allowed.

JAMES W. STEEN, *Judge*.

Defendant's requested Instruction No. 17, Being Instruction No. 39 of general instructions of Court until withdrawn:

The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the engineer on engine No. 2113 was running his train at a high rate of speed and in not using the train power brakes by which he might have controlled its speed, or have stopped it when signaled to do so, as alleged in sub-division O of the tenth paragraph of plaintiff's petition.

Withdrawn and excepted to by defendant.

JAMES W. STEEN, *Judge*.

(REPORTER'S NOTE.—Above instruction No. 39, being requested instruction No. 17, was withdrawn from the jury after the jury had returned asking an explanation of said instruction, the Court stating that the same was embodied in the general charge by mistake, as will appear in the following pages of this record.)

405 Thereupon, the plaintiff asked the Court to give to the jury the following instructions, on the same day, viz., December 2, 1913, and before the court had read its instructions to the jury, which said instructions were refused by the court and exceptions allowed the plaintiff, viz:

Plaintiff's requested instruction No. 1:

If you find from the evidence in this case that the railroad train which killed William L. Turner was moving at a rate of speed forbidden by the ordinances of the City of Enid, Oklahoma, and that said place where the killing occurred was wholly within the limits of said City, the law authorizes you to infer negligence on the part of the railroad Company as one of the facts established by the proof.

Offered by Plaintiff, refused by the Court and exceptions allowed.

JAMES W. STEEN, *Judge*.

406 Plaintiff's requested instruction No. 2:

You are instructed that ordinarily one who enters the service of a railroad company assumes the risk of his employment, by which is meant the ordinary happenings and occurrences of such service, and subject to those happenings which are merely accidental and not the result of the negligence of such railroad company, defects of its machinery, or unlawful acts, none of which are covered by the expression "Assumption of risk". That if you believe from the evidence that the engine and cars which ran over and killed William L. Turner on the 28th day of July, 1912, were operated in violation of a Statute of the United States, then you shall not find that said Turner assumed the risk of his employment, provided, you also find that such operation in violation of statute contributed to the injury.

Offered by Plaintiff, refused by the Court and exceptions allowed.

JAMES W. STEEN, *Judge*.

407 Thereupon, and on the same day, viz., December 2, 1913, after the Court had instructed the jury as to the law of the



case, this cause was argued to the jury by counsel for plaintiff and defendant.

Thereupon, the noon hour having arrived, the Court takes a recess until the hour of 1:30 o'clock, p. m. of this day, viz., December 2, 1913, the Court first duly admonishing the jury not to talk about the case on trial, either among themselves or with any other person, and not to remain in the presence or hearing of any person discussing the case, and to be in their seats in the jury box at 1:30 o'clock, p. m.

408

Afternoon Session, December 2, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of 1:30 o'clock, p. m. of this day, viz., Tuesday, December 2, 1913, with the Honorable James W. Steen sitting as Judge of said Court and all the officers of the Court and the parties hereto present by their respective counsel, as aforesaid.

The jury empaneled and sworn to try the issues in this cause is present in the jury box in a body, and by order of Court the jury is polled by the Clerk, and each juror answers "Present" as his name is called and they are all present.

Thereupon, the argument in this cause is continued, and the cause is further argued to the jury by counsel for plaintiff and defendant.

Thereupon, at the close of the argument, the jury empaneled and sworn to try the issues in this cause is by the Court directed to proceed to their jury room in charge of their two sworn Bailiffs to deliberate upon their verdict, and are duly admonished by the Court to remain together in their jury room and not to speak with any person not on the jury about the case on trial.

Thereupon, the two Court Bailiffs, Steele and Shepherd are by the Clerk duly sworn to serve as Bailiffs of the jury, to keep them together and not to speak with them upon any matter except to ask them if they have agreed upon a verdict and to return them into court when they have so agreed or when ordered by the Court.

Thereupon, the jury in this cause retires to their jury room for deliberation.

409 Thereupon, at the hour of 5:45 o'clock, p. m. of this day, viz., December 2, 1913, the jury empaneled and sworn to try the issues in this cause, return into open Court in charge of their sworn bailiffs, the plaintiff being present by John C. Moore, his counsel and the defendant being present by J. C. Roberts, its counsel, and it is admitted by counsel for plaintiff and defendant that the jurors are all present in open court in the jury box.

Thereupon, the Court asks the jury if they have agreed upon a verdict, and their Foreman replies that they have agreed to come into open court and ask for additional instructions or for an explanation of a certain instruction embodied in the Court's instructions, and the jury is advised by the Court to submit their request in writing.

Thereupon, Fred Walker, the Foreman of the Jury, in open Court, submits the following to the Court, viz:

"Hon. Jas. W. Steen:

The jury in the Bond, Adm'r. vs. R. I. R. R. Co. as a whole requests explanation as follows:

Part of the Body contends that this Section 39 relieves the R. R. Co. from liability of negligence if they were running at a high rate of speed.

A part of the jury further contends that this paragraph only pertains to the use of the brakes.

FRED WALKER, *Foreman.*"

410 By the Court: Gentlemen of the Jury: The Court now withdraws from your consideration Instruction No. 39, mentioned in your request, it appearing that said instruction was given and embodied in the charge through a mistake.

By Mr. Robberts: The defendant objects to the with-drawal of Instruction No. 39 from the jury, it appearing at this time that the jury has been out for several hours.

By the Court: On examination of Instruction No. 39, I find by mistake that it was included in the instructions, and I now withdraw it.

By Mr. Robberts: To which the defendant objects.

By the Court: Gentlemen of the Jury: How do you stand?

By the Foreman: We have unanimously agreed that that instruction No. 39 be explained.

By the Court: Have you taken a poll?

By the Foreman: Only on some things.

411 Thereupon, it is agreed in open Court by and between counsel for plaintiff and defendant that the jury may be sent for refreshment in charge of their sworn Bailiffs and then conducted to their jury room for further deliberation, and that the jury may return a sealed verdict tomorrow morning, viz., December 3, 1913, if they have agreed, the Court duly instructing the jury that when they have agreed upon a verdict they may deliver the same, signed, to their Foreman and by him sealed in an envelope and retained until the convening of court tomorrow morning.

Thereupon, the jury is by order of Court first sent to the American Hotel, Enid, Oklahoma, in charge of their sworn bailiffs for supper, the Court duly admonishing the jury not to talk with any person about the case on trial and to only discuss the same themselves when in a body in the jury room, and not to remain in the presence or hearing of any person discussing the same; and that after supper they may return to their jury room in charge of their sworn bailiffs to deliberate upon their verdict.

Thereupon, by order of Court, the District Court of Garfield County, Oklahoma, takes a recess until the hour of nine o'clock, a. m., December 3, 1913, public proclamation of the recess thereof first being made in open Court by the Court Bailiff.



412 Morning Session, Wednesday, December 3, 1913.

Thereupon the District Court of Garfield County, State of Oklahoma, convened at the hour of nine o'clock, a. m. of this day, viz., Wednesday, December 3, 1913, with the Honorable James W. Steen sitting as Judge of said Court, Geo. M. Scifres as Clerk and W. R. LeCompte as Reporter, public proclamation of the convening thereof, pursuant to recess heretofore taken, first being made in open Court by the Court Bailiff.

Thereupon, comes into open Court the jury empaneled and sworn to try the issues in this cause, in charge of their sworn Bailiffs. The plaintiff is present by John C. Moore, his attorney, and the defendant is present by Robberts and Curran, its attorneys.

Thereupon, by order of Court, the jury is polled by the Clerk and each juror answers "Present" as his name is called, and they are all present.

By the Court: Gentlemen, have you agreed upon a verdict?

By Foreman Walker: We have, your honor.

By the Court: Pass it to the Bailiff and the Bailiff will pass it to the Clerk, who will read and record it.

413 Thereupon, the Clerk of the Court, reads in open court, in the presence and hearing of the jury and the parties hereto, the verdict of the jury so returned, and which said verdict, with all the endorsements thereon, is in the words and figures following, viz:

"In the District Court in and for Garfield County, State of Oklahoma.

Case No. 1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Verdict.*

We, the jury empaneled and sworn to try the issues in the above entitled cause, do, upon our oaths, find for the plaintiff and against the defendant; and we fix the amount of recovery at \$7583.00; which we divide as follows:

For Mrs. Ida Turner.....	\$3083
Vera Turner .....	400
Mary Turner .....	550
Dorthea Turner .....	650
William Turner .....	800
Bessie Turner .....	900
Austin Turner .....	1200

And for Nellie and Annie Turner we find nothing.

(Signed)

FRED WALKER, *Foreman.*"

(Endorsed on back as follows:) Verdict No. 1452. A. P. Bond, Administrator of the estate of Wm. L. Turner, deceased, vs. Chicago, Rock Island and Pacific Ry. Co. Returned into open Court and filed this 3 day of December, 1913. Geo. M. Scifres, Clerk."

414 Thereupon, the verdict, so returned, is by the Court ordered recorded as the verdict of the jury herein, and the jury in this cause is by the court discharged from the further consideration of this cause, with the thanks of the court.

And be it further remembered, that thereafter and on, to-wit, the 5th day of December, 1913, and at the same term of court at which this cause was tried, and said verdict was returned, and within the time allowed by law, the said defendant filed in the office of the clerk of the District Court, in and for Garfield County, Oklahoma, its motion for a new trial, which said motion with all the endorsements thereon, is in words and figures as follows:

415 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of W. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Motion for New Trial.*

Comes now the defendant, the Chicago, Rock Island & Pacific Railway Company, and moves the Court to vacate and set aside the verdict heretofore returned into court by the jury in the above entitled cause on the 3rd day of December, 1913, and for a new trial therein for the following grounds and reasons, to-wit:

First. Because of the irregularity of the proceedings of the court and jury, and in the trial of said cause by which the defendant was prevented from having a fair trial.

Second. Because of the misconduct of the jury.

Third. For the reason that excessive damages appear to have been given by the jury under the influence of passion and because of the prejudice of the jury in said case.

Fourth. Because of error in the assessment of the amount of recovery, the same being too large in each and every instance and particular and for each of the persons respectively and specifically mentioned in said verdict.

Fifth. The verdict of the jury is not sustained by sufficient evidence.

Sixth. The verdict of the jury is contrary to the weight of the evidence.

416 Seventh. The verdict of the jury is contrary to law.

Eighth. Because of errors of law occurring at the trial and excepted to by the defendant herein at the time.

Ninth. The defendant, in addition to the above and foregoing causes and grounds for a new trial, and without waiving any of said grounds, alleges that the court erred in giving to the jury Instructions Numbers 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25 and 38, to the giving of which said instructions, and each and all of them, the defendant at the time objected and excepted.

Tenth. The court erred in withdrawing from the jury Instruction No. 39, after the same had been submitted to them, and upon request by said jury for an explanation thereof, which said instruction is in words and figures as follows, to-wit:

"39.—The court instructs the jury that there can be no recovery in this case upon the plaintiff's allegation that the defendant was negligent in that the engineer of engine No. 2113 was running his train at a high rate of speed, and in not using the train power brakes by which he might have controlled its speed, or have stopped it when signaled to do so, as alleged in sub-division O of the tenth paragraph of plaintiff's petition."

Said request from said jury, being in words and figures as follows, to-wit:

"Hon. Jas. W. Steen: The jury in the Bond, Adm'r vs. R. I. R. R. Co. as a whole, requests explanation as follows:

Part of the body contends that this Section 39 relieves the railroad company from liability of negligence if they were running at a high rate of speed.

A part of the jury further contends that this paragraph only pertains to the use of the brakes.

(Signed)

FRED WALKER, *Foreman,*"

to which action of the court in removing from the list of instructions, and withdrawing the same from the jury upon said request of the Foreman, above mentioned, the defendant objected and duly excepted at the time.

Eleventh. The court erred in refusing to give instructions Numbers 1, 22 and 11, which were at the time requested by the defendant, and to which refusal of the Court to give said instructions, the defendant at the time duly excepted.

C. O. BLAKE,

W. H. MOORE,

J. G. GAMBLE, AND

ROBERTS & CURRAN,

*Attorneys for Defendant.*

No. 1452. Motion for New Trial. Filed Dec. 5, 1913. Geo. M. Scifres, Clerk District Court.

418 And thereafter, and on, to-wit, the 15th day of December, A. D., 1913, there was made, filed and entered in the office of the Clerk of the District Court in and for said Garfield County, Oklahoma, a Journal Entry of the Judgment of the Court herein, upon the verdict of the jury, and which said Journal Entry and Judgment, with all the endorsements thereon, is in the words and figures following, viz:

19 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Journal Entry.*

Be it remembered, that on Friday, the 28 day of November, 1913, the same being one of the regular court days of the May Term, 1913, of said court, this cause came regularly on to be heard on its merits, and the plaintiff was present in his own proper person and by his attorney, John C. Moore, and the defendant corporation by its attorneys, W. H. Moore, J. G. Gamble and Robberts and Curran; and also came a jury of twelve good and lawful men of the body of the County of Garfield in the State of Oklahoma, and both parties announcing ready for trial, the said jury was duly sworn to try said cause and a true verdict render according to the law and the evidence, and the plaintiff began the introduction of evidence and continued until the hour of adjournment for the day; whereupon, the court adjourned until the hour of nine o'clock Saturday morning, the 29 day of November, 1913, and on said last named day at the hour of nine of the clock in the forenoon the court convened pursuant to adjournment, present as on the day before, and the plaintiff continued the introduction of evidence until the hour of adjournment; whereupon, the court adjourned until the hour of nine of the clock in the forenoon of Monday, the first day of December, 1913, and at the said hour of nine of the clock of Monday the first day of December, 1913, the court  
20 convened, present as before, and the plaintiff continued the introduction of testimony until the hour of completion and rested; and the defendant commenced the introduction of testimony and continued until the hour of adjournment; whereupon, the court adjourned until the hour of nine of the clock on the morning of Tuesday, the 2d day of December, 1913, and on said hour on Tuesday, the 2 day of December, 1913, the court convened, present as before, and the defendant continued taking testimony, until the hour of completion, and the plaintiff introduced rebuttal, and then both parties announced that they rested; and thereupon, the court instructed the jury; and thereupon, counsel addressed the jury in behalf of both plaintiff and defendant and the cause was submitted to the jury for their verdict, and were then placed in the hands of a sworn bailiff and retired to their jury room to deliberate as to their verdict; and the hour of adjournment having arrived, the said jury were called before the court, and the plaintiff and the defendant were then and there present, and the jury not having arrived at a verdict, the plaintiff and defendant in open court and in the  
presence of the court consented and agreed that the jury might con-

tinue in their deliberations, and that on arriving at a verdict, that they might sign the same and enclose same in an envelop- and seal the same and retire to rest, and report their verdict in open court next morning; whereupon, the court made an order to the effect, and the jury again retired to consider of their verdict. Whereupon, the court adjourned until nine of the clock of the morning of

Wednesday, the 3 day of December, 1913, and on said hour  
421 of Wednesday the 3 day of December, 1913, the court convened, present as before, and the said jury returned into court their verdict, sealed, as the court directs, in the words and figures as follows:

"In the District Court in and for Garfield County, State of Oklahoma,

Case No. 1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Verdict.*

We, the jury empaneled and sworn to try the issues in the above entitled cause, do, upon our oaths, find for the plaintiff and against the defendant; and we fix the amount of recovery at \$7583.00; which we divide as follows:

For Mrs. Ida Turner.....	\$3083
Vera Turner .....	400
Mary Turner .....	550
Dorothea Turner .....	650
William Turner .....	800
Bessie Turner .....	900
Austin Turner .....	1200

And for Nellie and Annie Turner we find nothing.

FRED WALKER, *Foreman.*"

Whereupon, it is considered, ordered and adjudged by the Court, that the plaintiff have and recover of and from the defendant the sum of Seven Thousand Five Hundred and Eighty-three Dollars, and that execution issue therefor.

JAMES W. STEEN, *Judge.*

O. K.

JOHN C. MOORE,

*Attorney for Plaintiff.*

ROBERTS & CURRAN,

*Attorneys for Defendant.*

No. 1452. Journal Entry. Filed Dec. 15, 1913. Geo. M. Scifres,  
Clerk District Court.

422 And thereafter, and on, to-wit, the 22nd day of December, 1913, the same being a judicial day of the District Court in and for said Garfield County, Oklahoma, this cause came on for hearing before the Honorable James W. Steen sitting as Judge of said Court, upon the Motion for New Trial, both plaintiff and defendant being present by their respective counsel, as aforesaid; and the Court after hearing the arguments of counsel, over-ruled said Motion, to which ruling the defendant then and there excepted and exceptions were allowed. And thereupon, upon application therefor, the defendant is allowed 60 days from this date in which to make, serve and file case made for appeal to the Supreme Court, the plaintiff to have ten days thereafter in which to suggest amendments, the case to be signed and settled upon five days' notice by either party; and supersedeas bond is fixed at double the amount of the judgment, a Journal Entry of which said orders of the Court was filed in the office of the Clerk of said Court on the 23d day of December, 1913, and which said Journal Entry, with all endorsements thereon is in the words and figures following, viz:

423 In the District Court in and for Garfield County, State of Oklahoma.

A. P. BOND (Adm'r), Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Journal Entry.*

Now, on this 22nd day of December, 1913, same being one of the judicial days of the regular May, 1913, Term of the above entitled court, the motion for new trial hereinbefore filed by the defendant came on regularly for hearing, each party being present by its attorney, and the Court having seen and considered the motion and the argument of the counsel thereon and being fully advised in the premises, doth find that said motion should be in all things over-ruled; wherefore, it is by the court considered, ordered and adjudged that said motion be and the same hereby is over-ruled, to which ruling the defendant duly excepted, which exception was by the court allowed.

And upon the application of the defendant, and for good cause shown, defendant is granted an extension of sixty days in which to make and serve case made, the plaintiff to have ten days thereafter in which to suggest amendments, the case to be signed and settled upon five days' written notice by either party. And it is further ordered that the defendant be granted a supersedeas of the judgment herein for thirty days, pending the filing of a supersedeas bond in double the amount of the judgment, as by law required, subject to the approval of the Clerk of this Court, and upon the filing

of said bond said judgment to be further superseded, pending the appeal to the Supreme Court.

JAMES W. STEEN, *Judge.*

Filed Dec. 23, 1913. Geo. M. Scifres, Clerk District Court. No. 1452.

424 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Reporter's Certificate.*

This is to certify that I, W. R. Le Compte, was at the time of the trial of the above entitled cause in the District Court of Garfield County, 20th Judicial District, State of Oklahoma, and now am, the duly appointed, qualified and acting Court Reporter for said County, District and State; that I was present at the trial hereof and made a full, true, complete and correct shorthand record and notes of all the proceedings, oral and otherwise, had upon the trial of said cause; and that the within and foregoing record and case made contains a full, true, complete and correct transcript and copy of my notes so taken and made, and includes all the evidence offered and introduced, the exhibits offered and introduced, the objections of counsel, the rulings of the court, the exceptions taken and allowed; and, including the verdict of the jury, the motion for new trial, the instructions of the court, the offered instructions, and the Judgment and Journal Entry of Judgment, and all other proceedings had upon the trial of said cause.

Witness my hand at my office in Enid, Oklahoma, this 7th day of January, A. D., 1914.

W. R. LE COMPTE,  
*Official Reporter.*

425 The above and foregoing sets out fully and correctly, the pleadings filed in said cause, and upon which the said cause was tried, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders; exceptions of plaintiff, all the evidence offered, introduced or received upon the trial; all admissions and agreements, all the instructions given to the jury, as well as those asked by the defendant and the plaintiff, and refused by the court; the verdict of the jury and the judgment of the court thereon; and the exceptions of the defendant thereto; the judgment of the court overruling the motion for a new trial by the defendant, and the exception of the defendant thereto; and the same is a full, true and complete and correct statement and transcript of the pleadings, motions, and all the evidence, findings and proceedings, in the said cause.



426 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Acceptance of Service of Case-made.*

I, the undersigned attorney of record for the plaintiff, in the above entitled cause, hereby acknowledge, that a full, true and correct copy of the within and foregoing case made was duly served on me this 19 day of February, 1914, and in due time, and I hereby acknowledge and accept service of the within case made as having been made on me on this date.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

427 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Waiver of the Suggestion of Amendments to the Case-made.*

I, the undersigned attorney of record for the plaintiff, in the above entitled cause, hereby waive the right to suggest any amendments to the above and foregoing case-made, and accept and acknowledge the same to be a true, complete and correct case-made, and a correct statement and complete transcript of the pleadings, all motions, orders, all the evidence, findings, judgments record and proceedings in the above entitled cause.

\_\_\_\_\_  
*Attorney for Plaintiff.*



428 In the District Court of Garfield County, State of Oklahoma.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Notice of Settlement.*

To A. P. Bond, Administrator, and John C. Moore, attorney of record in the above entitled cause:

You are hereby notified that the case made in the above entitled cause will be presented to the Honorable James W. Steen, Judge of the 20th Judicial District, State of Oklahoma, and trial Judge in said cause, at his chambers in the City of —, Oklahoma, in the 20th Judicial District of Oklahoma, on the — day of —, 1914, for settlement, allowance and signing, at the hour of — o'clock, — M. of said day, or as soon thereafter as counsel can be heard, of which you will take notice, and at which time and place you may be present if you desire.

\_\_\_\_\_,  
*Attorneys for Defendant.*

I hereby acknowledge service of the above and foregoing Notice as having been duly given to me this — day of —, 1914.

\_\_\_\_\_,  
*Attorney for Plaintiff.*

429 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Waive- of Notice of Time and Place of Presentation of Case-made to Trial Judge for Settlement and Signing.*

I, the undersigned attorney of record for the above named plaintiff, *due* hereby waive notice to me of the time and place of the presentation of the above and foregoing case-made to the Judge of said District Court, before whom said cause was tried for settlement and signing, and hereby agree that said case-made may be presented to said Judge for settlement and signing and be settled, signed and allowed by said Judge at any time when it may suit his convenience to do so.

\_\_\_\_\_,  
*Attorney for Plaintiff.*

430 In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

*Waiver of Issuance of Summons in Error and Entry of Appearance in the Supreme Court.*

The Plaintiff in the above styled cause, by his Attorney of Record, the undersigned, hereby waives the issuance and service of summons in error in this cause, and hereby enters his appearance in the Supreme Court of the State of Oklahoma.

\_\_\_\_\_  
*Attorney for Plaintiff.*

431 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Suggestions of Amendment to the Case-made.*

Regarding the case-made in this cause served on the 19 day of February, 1914, on plaintiff by defendant, the following suggestions of amendment are made:

First. The plaintiff suggests that in indexing the case made errors have occurred, by which one following the index does not find the entry on the page stated in the index. Plaintiff therefore requests that when the completed case-made is settled and signed by the Judge, that defendant make for plaintiff a correct index to the completed case-made, and deliver the same to plaintiff's attorney.

Second. Plaintiff suggests that at the close of the first paragraph on page one of said case-made there be inserted the petition of plaintiff in this cause as it appeared on file on the 24 day of June, 1913, together with the exhibits A and B, thereto attached, and preceded by the words: "which petition is as follows."

Third. That in the next paragraph on said page, where the words occur: "And on June 24, 1913, the said defendant filed its petition and bond for removal of said cause to the District Court of the United States for the Western District of Oklahoma, "that the said petition and bond be set out in hæc verba, preceded by the words, "Said petition and bond being as follows": and followed by the words: "which

petition was by the court on the — day of —, 1913, sustained, and the cause ordered removed to said United States court, which order is as follows, "and that the order of removal be then set out in haec verba.

Fourth. That at the close of the same paragraph, but on page 2 of the case-made, the order therein referred to be set out in haec verba, but preceded by the words: "which order is as follows:

432 Fifth. That between the word: "fourth" and the word: "which" in the next clause on said page 2 there be inserted these word-: "which motion is as follows," and that then the motion therein referred to be fully set out.

Sixth. That at the close of said section the following words be added: "which order is as follows," and then set out in full the order of the court sustaining defendant's motion to strike.

JOHN C. MOORE,  
*Attorney for Plaintiff, Bond.*

We, the undersigned attorneys of record in the above cause, for the defendant corporation hereby acknowledge service of the suggestions above set out, this 23 day of February, 1914.

ROBERTS & CURRAN,  
*Attorneys for Defendant Corporation.*

433 In the District Court of Garfield County, Oklahoma.

1452.

A. P. BOND, Administrator of the Estate of Wm. L. Turner, Deceased, Plaintiff,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Additional Suggestion of Amendment to the Case-Made.*

The plaintiff, on examination of the case made, has discovered that on page 84 of the case made, the witness, George H. McBlair, in answer to the question, "When they had got closer to Turner how had Turner stepped?" is made to answer as follows: "He had stepped his feet over the rail, and when the brakeman hallowed he turned to the right, looking eastward, the train then hit him and drew him down."

When in truth and in fact his answer was in the following words, and none other: "He had stepped his left foot over the west rail, and when the brakeman hallowed he turned to the right looking eastward, the train then hit him and drew him down."

Plaintiff suggests to the court that the record be changed to insert the word "west," in said answer immediately above where said word or some other word has been written in said answer, between the words, "the" and "rail" and then blotted out with x marks and oblit-

erated, and that if the defendant does not consent thereto, that the judge appoint a day for hearing same and that the stenographer who transcribed the testimony, and the witness who gave it, be required to be present, to testify in this regard.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Received the above suggestions of amendment in this cause this 25 day of February, 1914.

ROBERTS & CURRAN,  
*Attorneys for Defendant Corporation.*

434 Received, Office of Att'y for Rock Island Lines, Mar. 6,  
19—.

In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Suggestions of Amendment to Case Made.*

Now on this 2 day of March, 1914, the plaintiff makes the following further amendment to the case made:

In the testimony of E. F. Smith, who was acting as Coroner, p. 69, he testified: "One foot was drawn up a little inside of the rail; (here the witness reached down and took his right leg in both hands just above the ankle and drew his lower right leg upward toward the upper part of the leg) (this was in full sight of every juror, but owing to the position of the Judge's stand the stenographer, Le-compte, did not see it nor record it) "the other one was on the outside severed from the body."

Plaintiff asks that the case made be so amended between the words "rail" and the word "the, in the said answer as to show the gesture of the witness in giving his testimony.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Service of this suggestion of amendment made this 2 day of March, 1914.

ROBERTS & CURRAN,  
*Attorneys for Defendant Corporation.*

435 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Notice.*

To said Chicago, Rock Island and Pacific Railway Company, Defendant, and its Attorneys of Record, C. O. Blake, and Roberts & Curran:

Take notice that the undersigned, plaintiff in this cause, will at the hour of ten of the clock in the forenoon of Saturday the 21 day of March, 1914, at the chambers of the Honorable James W. Steen, Judge of the District Court of Garfield County, Oklahoma, at the court house in the City of Enid, apply for allowance of suggestions of amendment to the case made in the above entitled cause suggested on the 23 day of February, 1914, also of that of February 25, 1914, also of the 2 day of March, 1914.

A. P. BOND,  
By JOHN C. MOORE,  
*His Attorney of Record.*

Received this notice this 13 day of March, 1914.

ROBERTS & CURRAN,  
*Attorneys for Defendant Corporation.*

436 In the District Court of Garfield County, State of Oklahoma.

Number 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Defendant.

*Certificate of Court.*

I, James W. Steen, Judge of the above entitled court, and trial judge in the trial of the above styled and numbered cause, hereby certify,

That I have examined the above and foregoing case made, and find the same to contain a full, true, complete and correct copy of all the evidence, pleadings, orders, judgments, motions, demurrers, instructions requested by the plaintiff and refused by the court, and instructions requested by the defendant and refused by the court; verdicts of the jury, exceptions, and all other proceedings both

written and oral, had upon the trial of said cause, and upon which said cause was tried, and that the same, and all thereof, is full, true, complete and correct, and I do so certify.

And it appearing that the said case made was within the time allowed by the court served upon John C. Moore, attorney of record for A. P. Bond, Administrator of the estate of William L. Turner, deceased, the plaintiff in the above entitled cause, and it further appearing that on February 23rd, February 25th, and March 2nd, 1914, the plaintiff suggested certain amendments to the said case made, a copy of which suggestions are incorporated herein; and it further appearing that the plaintiff did on March 13th, 1914, 437 serve notice upon the defendant fixing the time for settling and signing said case made as Saturday the 21st day of March, 1914, and the place at the chambers of the undersigned, at the Court House in the City of Enid, Garfield County, Oklahoma; and,

Now on this 21st day of March, 1914, at my chambers in the Court House in the City of Enid, Garfield County, Oklahoma, the plaintiff being present by his attorney of record, John C. Moore, and the defendant being present by Robberts & Curran and J. G. Gamble, upon consideration of the said suggestions of amendment, I do now allow the amendment of February the 25th, 1914, and I do now disallow the suggestions of amendment dated February 23rd, and March 2nd, 1914, to which action of the Court the plaintiff excepts, and his exception is allowed, and the said case made having been amended as suggested in the suggestion of February 25th, 1914, I now hereby sign, settle and allow the above and foregoing as a true, complete and correct case made in said cause, and the Clerk of this Court is hereby directed to attest same and file the same of record in the above entitled court.

The clerk of this court is further directed after having attestel and filed this case made of record in his office, to deliver the same to the attorneys of record of the defendant for filing in the Supreme Court of the State of Oklahoma.

Given under my hand and the seal of said court on this 21st day of March, A. D. 1914.

JAMES W. STEEN,  
*Judge of the District Court within  
and for the County of Garfield,  
State of Oklahoma.*

Attest:

[SEAL.] GEO. M. SCIFRES, *Clerk.*

Filed Mar. 21, 1914. Geo. M. Scifres, Clerk District Court.

138 And thereafter, at the April, 1914, Term of said Supreme Court, on the 7th day of July, 1914, the following proceeding was had in said cause, to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,  
 vs.  
 A. P. BOND, etc., Defendant in Error.

And now on this day it is ordered by the court that leave be granted to complete the case made in the above cause, under the direction of the trial court, or judge thereof, within thirty-five days, upon five days' notice to the opposite party, in the particulars specified in the motion filed herein on July 2, 1914.

439 And thereafter, at the July Term, 1914, of said Supreme Court, on the 14th day of July, 1914, the following proceeding was had in said cause to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,  
 vs.  
 A. P. BOND, Adm'r, Defendant in Error.

And now on this day it is ordered by the court that the above cause be advanced and set for hearing at the October 1914 term of court.

440 District Court of Garfield County, Oklahoma.

#6528.

Enid, Oklahoma.

*Index—Amendments.*

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Filed Jul- 28, 1914. W. H. L. Campbell, Clerk.

441 Filed Jul- 27, 1914. Geo. M. Scifres, Clerk District Court,  
by ———, Deputy.

In the Supreme Court of the State of Oklahoma.

6528.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
a Corporation, Plaintiff in Error,

vs.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Defendant in Error.

To the Chicago, Rock Island and Pacific Railway Company, a  
Corporation, Plaintiff in Error in the Above Entitled Cause, and  
to C. O. Blake, R. J. Roberts, J. G. Gamble and Robberts &  
Curran, Its Attorneys of Record:

Take notice that on Monday the 27th day of July, 1914, at  
chambers, in the city of Enid, Garfield, County, Oklahoma, in the  
court house of said County, at nine o'clock in the morning, or  
so soon thereafter as counsel can be heard, I shall apply to the  
Honorable James W. Steen, Judge of the Garfield County District  
Court, to sign and settle the amendments to the case made as ordered  
by the Supreme Court of the State of Oklahoma on the 7th day of  
July, 1914, which are the original petition with its exhibits, the  
petition for removal to the United States District court for the  
Western District of Oklahoma, the order of the District Court of  
Garfield County Oklahoma removing said cause to said United  
States court, and the order of said last named court remanding  
said cause to the said district court of Garfield County, Oklahoma.

JOHN C. MOORE,

*Attorney for Defendant in Error.*

442 Received the above notice of the application for amend-  
ment to case made, and also a copy of the amendments to  
be allowed, this 14 day of July, 1914.

ROBBERTS & CURRAN,

*Attorneys for the Plaintiff in Error.*

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443 In the Supreme Court of the State of Oklahoma.

6528.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Plaintiff in Error,

v.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Defendant in Error.

*Completion of Case-made.*

Pursuant to the order of the Supreme Court of the State of Oklahoma, made and entered of record on the 7 day of July, 1914 in the above entitled cause, granting leave to Defendant in error to complete the case made as by motion asked, to be under the direction of the trial court or the Judge thereof, within 35 days, upon 5 days' notice to the opposite party, and in compliance therewith:

Be it remembered that heretofore to wit, on the fourth day of June, 1913, the said A. P. Bond as the administrator of the estate of William L. Turner, deceased, filed in the District court of Garfield County, Oklahoma, his petition in the words and figures as follows:

444 In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Action for Damages.

*Petition.*

The plaintiff states that William L. Turner departed this life on the 28 day of July, 1912, at Enid, Garfield County, Oklahoma, leaving as all and his only heirs, his widow, Ida M. Turner, residing at Enid, Garfield County, Oklahoma, Nellie Munger, a daughter, aged twenty two years, now residing at Creston, in the State of Iowa, and Annie Foley, a daughter, now aged twenty year-, Vera Turner, a daughter, now aged fifteen years, Mary Turner, aged ten years, a daughter, Dorthea, a daughter aged eight years, William L. Turner, a son aged six years, Bessie Turner, a daughter, aged four years, and Austin L. Turner aged one year, a son, and residing with their mother at Enid, Garfield County, Oklahoma.

That thereafter towit, on the 4 day of June, 1913, this plaintiff was by the county court of Garfield County, Oklahoma, duly and

legally appointed Administrator of the estate of the said William L. Turner, deceased, the said court then and there having full power and authority to make said appointment, and thereupon and before filing this action, he duly and legally qualified as such, and entered upon his duties as Administrator, and as such Administrator he brings this action for the benefit of said widow and children. He further states that he is an actual resident of Garfield County, Oklahoma.

445 That the Chicago, Rock Island and Pacific Railway Company, defendant, is a common carrier, engaged in interstate commerce by railroad and as such owns and operates a line of railway through Kansas, Oklahoma, Texas and other states, and has so owned and operated said line continuously for many years to the present time, and is now so owning and operating same and was so doing on the 28 day of July, 1912, when William L. Turner deceased was killed through the negligence of defendant as hereinafter set out. That said line of railway track passes through Garfield County, and through the incorporated limits of the city of Enid, Oklahoma, as do all other tracks and lines of said road hereinafter described.

That said defendant railway company has at all such times maintained within the corporate limits of the city of Enid, in Garfield County, Oklahoma, its main line and a series of tracks nine in number, for switching, passing, loading and unloading and for other necessary purposes, at the point where, the freight house stands, east of it for the purposes named. They are successively, beginning at the freight house and following, east, as follows: The house track, which is for the immediate accommodation for loading and unloading freight at said freight house, the main line track, on which all trains enter and leave the city, the passing track used to allow trains to pass each other, track number one, track number two, track number three, track number four, all of which are for switching and other general purposes of said company in making up its trains for interstate and local traffic, and track number five for similar purposes, and the last track, which terminates on the north as a dead track, that is having no communication at that end with any other track, and can be entered upon only from the south. The house track runs north from the freight house and soon joins the main track, between the freight house and the passenger depot.

446 The main track passes the depot immediately next to its platform. At the south end of this platform stands a watering spout, at which engines stop to obtain water. All the other tracks are parallel, nearly north and south for a considerable distance, so as to accommodate a number of large trains at once, and still leave room for working all business, but on the north and on the south they gradually approach the main track to which they are all joined within the city limits. The distance from the north to the south limit of these tracks is about half a mile. The southern limit is at or very near a structure which the defendant maintains for unloading coal, called the coal chutes, into which coal is unloaded for the general use of all engines of defendant in use on the

road, local and interstate, which structure is hereinafter more particularly described. On the north they extend beyond Market street a considerable distance, which street crosses the main line and switches about one hundred feet north of the passenger depot, and runs east and west. Passenger train number twenty four, which in the whole of August and July, 1912, had its schedules for Enid at or soon after five o'clock in the afternoon, daily, coming always from the south, stops at the water spout above named and then its rear is a short distance north of the freight house, and when it pulls up to the depot, the engine stands a distance north of said Market street. At such times it gives the signal for crossing a highway, while when further south coming past the coal chutes and freight office it makes many signals with its whistle and its bell, and is creating a very great amount of noise and confusion as to sound, by the application of air to the brakes, and the clanging of cars, the escape of air and steam, and drowns all other sounds of ordinary character, and mingles its signals with any other signals that may at the time be given by other engines or trains that may at the time be in the yards. This confusion of sound, hustle and bustle most occur when slowing up to take water at the watering spout above described. The foregoing details are made that the court may more fully understand the pleas regarding negligence of the defendant, its carelessness, the incompetence of its employees and servants, and the wanton and wrongful acts on their part, in running the train and number twenty four, which caused the death of the said William L. Turner.

That the city of Enid is a city of the first class under the definitions of the statutes of the State of Oklahoma, and has adopted a charter under and by virtue of power granted by the constitution and laws of Oklahoma, among which powers is that to regulate the speed of all trains within the limits of the city of Enid, whether on the main line or on the switch tracks within its limits, and that in pursuance of such power it has fixed the speed of such trains, beyond which it is unlawful to proceed.

That the plaintiff further states that William L. Turner, deceased, at the time of his death was in the service of the defendant, a corporation, under two distinct and separate written contracts, one for unloading coal into the chutes as erected and maintained by defendant to supply coal to its engines engaged in pulling trains engaged in interstate commerce and also those for the switch yards, herein called the unloading contract, also for unloading cord wood and sand for the defendant, and for loading waste cinders about the switch yards, a copy of which contract is hereto attached as exhibit A and by this reference made a part of this petition. That the immediate duties of said contract required that he should determine when a car of coal was needed to the chutes in order to keep up the supply, and to order same set in, and that when so set in that he should proceed to unload same into the chutes for the use of all engines of the road, interstate and intrastate, there being daily as many as five engines taking coal for use of interstate engines to one for local or intrastate use. Other duties imposed by said contract,

though not enumerated therein were to cause to be set in for different customers, coal car- and cars with other loads, for un-  
448 loading at the sides of the track, which necessitated visits to all parts of the switching yards. That enginemen, and others in charge of engines, whether running engines engaged in interstate commerce over said road or for mere local traffic, were required to replenish their engines with coal from said chutes when necessary and so doing, were required to deposit in a box fixed there, cards, on which were entered the engine number, the name of the person in charge of same and the amount of coal taken from the chutes and such other facts as the company required. That at about the hour of five o'clock in the evening of each day the deceased, by said contract was required to take such coal tickets from said box, and soon thereafter turn them in at the freight office of the company at the freight house above described.

Regarding the other contract, herein called the cooperage contract, a copy of which is hereto attached and marked Exhibit B, he was required by its terms to examine cars in all parts of said yards to determine whether they were in condition to transport grain without leakage from Enid to other points within and without the State of Oklahoma, and if found unfitted for such purpose he was required to make such repairs under minute specifications as would render them safe from leakage of grain, which duties also called him to all parts of said yards and placed him on duty repairing cars for interstate commerce. That his duties thus generally appertained to the operation of an instrumentality for interstate commerce, to wit, the operation of the coal chutes, the delivery of the coal tickets, and the repairs of interstate cars. That in the general discharge of his duties he was in fact principally and constantly engaged in duties connected with and furthering of interstate commerce, in the service of the defendant, railway company, which company was at all the time mentioned engaged in interstate commerce over said line of road and over its switch tracks in said  
449 city, including track two hereinafter more particularly described.

That on the 28 day of July, 1912, at about the hour of five o'clock in the afternoon, he had taken the tickets from this box; the whole south end of the switch yards from the freight house south to the chutes, and to the lower or most southerly limits of the switch tracks, was entirely free, clear and wholly unoccupied by any engine or cars, the nearest being some empty cars a quarter of a mile to the north, and occupying solely the ninth or dead track on the far east of the switching yards, and by the side of the White Mill, hereinafter named. There was at the time a strong wind blowing from a direction a little west from south, and of such character that smoke from engines, factories and mills was blown to or near the ground, instead of rising high and clear into the upper air. The general trend of all the switch tracks was more nearly to the south than the direction the wind came from. So that the wind crossed the tracks in a long angle. From the chutes, after obtaining the tickets in the box, he went toward the north and east until he came

to a car on the dead track, standing further south than any other car, and into which he had men loading coal from the ground. There, from his helper, he obtained some coal tickets taken out a little earlier and went north to the White Mill which stands across all the tracks from the freight house and a little further north. There he arranged with the fireman of that mill to set in a car of coal, and while conversing a train whistle for the station sounded, when Turner took out his watch and said, "That is twenty four, I must go and turn in these coal tickets," and immediately started away. By reason of the cars standing on the dead track he was compelled to go some distance to the south before crossing that track, but when he did so he was further south than the north end of the freight house where he must enter. He had long been in the service of defendant company and was thoroughly familiar with all character of train signals at stations and in yards, reading  
450 and understanding them instantly and depending on them for information instead of unknown or unprescribed acts, sounds or noises. He passed around the cars on a dead track, and as he reached a point where he was ready to cross over to the main track, train number twenty four, a finely equipped and large passenger train was coming in from the south, just passing the coal chutes and the south ends of the switch tracks giving its signals with whistle and bell, making much steam and smoke, and much noise, and clanging, escape of steam, putting air on the brakes, and hustle and hurry, on the main track. The strong wind carried the smoke and steam near the ground and hid all objects which it engulfed. That among such objects thus hidden, were road engine number 2113 just in from Kansas with a special train which it had uncoupled from, at the north end of the switches, except two box cars and one or two flat cars attached, had proceeded from the north to the south end of the switches while Turner was at the White Mill, and unobserved by him, and had just entered upon the switch at the south out of the way of twenty four coming in on the main line. Of this engine and cars, Turner was wholly unaware, and believed from his recent presence at the chutes that no cars or engines were in that part of the switch yards, except twenty four coming in on the main line. He was confirmed in this that all seemed clear, as nothing appeared on any of the tracks, visible outside the steam and smoke which twenty four had made. At about that moment he was rounding the south end of the standing cars on the ninth track, and crossed that, and five, four and three and there, between two and three he proceeded north between the tracks until he should arrive at the point where he should cross over the other tracks to the freight house. He could see, only twenty four, and it was rapidly coming up the line toward him but three tracks further over. The engine, 2113 and its little train were not visible to him, nor he to them until about two or three car lengths to the south of  
451 him, the fireman on this engine and a brakeman on the end of the advancing flat car saw him walking north between the tracks two and three, but he did not discover them his back being toward them. They gave him no signal, rang no bell, blew

no whistle nor made any sound, all the time rapidly advancing toward him at a rate of twenty miles an hour, and in no way notifying him of their presence or advance. Plaintiff states that the deceased was then and there, and until his death, wholly unaware that there were any engines or cars south of him on any of the switch tracks, and that from his own recent presence at the chute a few minutes before he personally knew that none were then there, and that none were visible there when he commenced to cross the tracks, and that he had good reason to believe that no engine was to the south of him on any of the tracks except that pulling twenty four into the station.

That amidst the smoke and steam of twenty four, this engine, number 2113 began to back as twenty four passed it, and in 30 doing remained for a considerable time and distance engulfed in the steam and smoke of both engines and was invisible. It was no-backing while Turner was walking north between track- two and track three, and as they emerged from the smoke he became visible to the fireman and brakeman, but he had not observed them. At this time twenty four was running up toward the watering spout, and slowing up with much noise and confusion, which drowned all other noises on account of the volume and variety of it. That the advancing switch engine gave no signals of any kind neither ringing its bell or blowing its whistle, nor slowing its speed nor giving any signal, but running parallel with and close to twenty four and at a higher rate of speed than is allowed by the ordinances of the city of Enid, so that the calamity which then and there occurred was plainly visible from the car windows of twenty four. During their approach to Turner no train signal was given to him warning him of their coming, the brakeman gave the engineman no signal,

and the fireman gave him none, and the brakeman carried no  
152 flag or other appliance with which to signal either the fireman or the engineman but continued to advance. That so soon as Turner had arrived at the point where it was proper to cross track two, he entered thereon, under the eyes of the brakeman and the fireman, but they were unseen and unobserved by him, as was, also, the train they were on. The brakeman, though quite near to him, seeing him enter on the track to cross it made no signal to the engineman to stop, nor to go slow, and in fact was not in sight of the engineman, keeping too much to the centre of his car so that the engineman could not see him. The fireman gave the engineman no signal to stop or go slow until he could know that Turner had passed safely over, so that the engineman was unaware of the danger, but it was fully known to the fireman and the brakeman. Neither of them gave Turner any signal of any kind to attract his attention, notifying him of their presence nor advance, nor of his danger, as he was about to enter on track two, and as he did enter on said track to cross it. Plaintiff states that on hearing a train signal of any kind that the deceased not only well understood it, but became immediately obedient to it, was cool in the presence of danger and cool in his conduct at such times, prudent and judicious. That if a signal, a train signal of any kind had been given warning him of his danger that he would at once have been

obedient to it and would have done what a trained railroad man would do on hearing such signal.

That he was seen by the said fireman and the said brakeman to leave the space between the tracks where he had been walking, and to enter on track two to cross it at a point about fifty feet east of the freight depot, with train twenty four coming in towards the watering spout just about twenty five feet ahead of him and on another track to the west while they with the flat car were a number of feet from him, and seeing that he had not observed them nor knew of their presence, and far enough to have stopped entirely, or to have slowed in their advance, but they gave no train signal, gave  
453 him no signal, the brakeman gave the engineman no signal, the fireman gave the engineman no signal the brakeman did not carry a flag or other appliance with which to make signals, they did not slow up or stop but came rapidly on, while if any such steps had been taken he would have been saved from injury.

Plaintiff further states, that as it was the deceased would have passed in the clear without the giving of the signals, but for the egregious blunder, and act of folly and incompetence of said brakeman, who lost his head and did an act which was the immediate and proximate cause of the death of said Turner, then and there. After entering on track two to cross it Turner was wholly unconscious of the approach of the flat car and in the belief that no movable cars were south of him, and the approaching cars were not making noise sufficient to be heard in the confusion and noise of twenty four, and no train signals were given, he stepped on toward the west side but northerly, so that he was going about due northwest toward which his face was, with his back toward the south east and toward the advancing flat car. He had advanced so far that he stepped his left foot over the west rail and set it down on the ground, having just before set his right foot down just within the west rail, and was in the act to raise his right foot and step clear over the west rail and off of the track entirely, and in the clear and out of danger, notwithstanding he had had no warning and was unaware of danger, and would not have been struck nor injured in any way but for the fatal act of folly, incompetence and negligence of the said brakeman, who suddenly, without any other warning or signal, gave a loud and piercing yell at the top of his voice and which was heard at the passenger depot, and even at the car windows of twenty four. Turner's face at the time was northwest. He was unaware of the approaching flat car. Hearing the yell, instead of stepping his right foot over the west track, he did not move his feet but turned on his knees and hips toward the right to see and learn the cause of  
454 the yell, and thus he was stopped in his progress across the track. This motion threw his weight on his right leg, and twisted his body so that he was in a strained position, and before he could recover his balance he was struck by the advancing flat car, presumably by the west bumper, and thrown entirely down upon his face and the front part of his body, his left leg still over the west rail and his right kinked and the foot very close to the west rail but within the track. His left foot was cut off above the ankle



and lay a foot or more outside the west rail, his body extending to the east and clear across the track, with his head cut off by the east rail as low down as the eyes, and he was instantly killed. That from the place of his being struck until the engine and cars came to a stop was more than three hundred feet the cars ran.

That in pushing said cars by said engine No. 2113, as hereinbefore set out, and by which the said William L. Turner was killed, the said engine and cars, and as a train, were operated and used by the engineman and train crew in violation of a statute of the United States, to wit: Section 2 of an act to amend an act entitled, an act to protect the safety of employes and travelers upon railroads by common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes, approved March second, eighteen hundred and ninety three, and amended April first, eighteen hundred and ninety six, in that no continuous train power brakes were operated or used by the engineer or other person in charge of said engine No. 2113, while backing up on track two as heretofore stated nor at any time before the whole of said train, after throwing said Turner down as aforesaid had passed entirely over his body, and that the speed of said engine and cars was not under the control and power of said continuous train power brakes, but was proceeding under the force of the engine, pushing, and such power brakes were not then and there used and operated to control the speed, nor for stopping, nor for any other purpose. That said act was in further violation of said statute in this, that it was in violation of a rule of the Interstate Commerce Commission of the United States made on the sixth day of June, 1910, made under and by virtue of the requirements of the said section above named directing said order to be made; that for the reasons above stated the said train was not controlled in its speed, and this caused said train to strike, kill and pass over the said William L. Turner.

Plaintiff has reason to believe that the several cars and the engine of said train were not connected up with the continuous train power brakes, and hence not under the control of the engine or engineman, and that same was negligence and violation of said statute, and plaintiff, without asserting that this is true, asks the court to diligently inquire into the facts thereof.

Having thus in detail given a description of the situation of the grounds, and a statement of the acts leading up to the killing and the killing itself, plaintiff now says: that the deceased, William L. Turner, was killed by the defendant's negligence, carelessness, wrongfulness and unlawfulness, and in the incompetence of its servants, agents and employees, while it was engaged as a common carrier in the interstate commerce by railroad and while the said William L. Turner was in the service of said defendant engaged in interstate commerce, and that the several of such acts are as follows:

1. By starting the switching train while twenty four was coming in on a track parallel thereto and running close together.



2. By starting and running in such proximity amid the smoke and steam which obscured it.

3. By failing to give the blasts from the whistle which the rules require before backing.

4. By neglecting, under the circumstances to ring the bell and sound the whistle frequently while so backing.

456 5. By continuing to back before twenty four came to a stop.

6. By commencing to back at a time and continuing so to do that its signals, if given, were likely to be commingled with those of twenty-four and to be incapable of being understood thus causing confusing, in the interpretation, and endangering those who might be near.

7. By the fact that its signals, if sounded, would be intermingled with those of twenty four and be misunderstood.

8. By failing to signal Turner, when seen walking between tracks two and three, to notify him of their presence and approach.

9. When seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger.

10. By the fireman in the cab with the engineman not having the engine slowed or stopped when he saw Turner entering on track two, until he should see that he had safely passed in the clear.

11. By the brakeman in the flat car when he saw Turner entering on track two failing to signal the engineman to stop or go slow until he could see that Turner was in the clear.

12. By the brakeman not having in his hand any flag or other device for signaling the engineman or the fireman such as the rules of the company require brakemen to have when performing that class of duties at all times.

13. By the brakeman being out of sight of the engineman and keeping out of his sight so that no signals could be seen if made.

14. By the brakeman in waiting to give signals to Turner until in imminent peril, and then, instead of remaining silent that he might pass in the clear, he gave a loud and piercing yell, which caused Turner, who was unaware of danger, to stop and turn, and thus lose valuable time to pass in the clear and also to throw him  
in more danger than before.

457 15. By thus stopping him in a place of peril until he was struck and killed.

16. The engineman was guilty of negligence in running his train in such high speed and in excess of the ordinances of said city, so that he could not slow it down or stop it entirely in a very few feet.

17. That he was guilty of negligence in so running his train at such speed in the switch yards and not constantly ringing his engine bell, and sounding the whistle.

18. That he was at fault and negligent, when he found that his brakeman was not in sight, that he did not stop his train and go to the brakeman and require him to keep in sight, that his signals could be seen.

19. That said train crew had abundant opportunity to have saved the life of Turner, but did not seize such opportunity.

Plaintiff says that the deceased, William L. Turner, in no way contributed toward the injury, nor was he in any way negligent in the premises.

Plaintiff therefore says that the defendant, while engaged in interstate commerce by the careless, negligent and wrongful acts of its agents, servants and employes, as above set out and detailed was guilty of negligence, carelessness and wrongful running of said engine number 2113 in backing in said switch yards and pushing said cars and engines over and killing him the said William L. Turner when at the time engaged in interstate commerce in the service of the defendant, in said switch yards in the City of Enid, in Garfield County, Oklahoma, as heretofore stated, and not through any contributory fault or negligence on his part.

That the deceased, William L. Turner, was at the time of his death of the age of forty six years, and that he had an expectation of twenty four years, being at the time a sound hearty and  
458 healthful man, and had all his life been so, and that for the twelve years preceding his death he had earned annually the sum of fifteen hundred dollars, and was so earning on the day of his death, and that said death as so stated is a cause of damage to said widow and children in the sum of thirty-five thousand dollars, for judgment for which plaintiff prays and for the costs of suit.

JOHN C. MOORE,

*Attorney for Plaintiff.*

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#### EXHIBIT A.

#### Copy.

This agreement, made in duplicate this first day of November, A. D. 1910, by and between the Chicago, Rock Island and Pacific Railway Company, a corporation, party of the first part, hereinafter called the "Railway Company," and W. L. Turner, of Enid, Garfield County, Oklahoma, party of the second part, hereinafter called the Contractor, Witnesseth That:

The parties hereto, for and in consideration of the covenants and agreements hereinafter set forth, and of the payment hereinafter provided for, covenant and agree, each with the other as follows:

First. The Contractor covenants and agrees, at his sole cost and expense, to furnish all the labor required and necessary to handle; and,

(a) To handle all the coal required by the Railway Company at Enid, Oklahoma, from either open or closed cars, or both, and to place same in coal chute pockets of the Railway Company; to gather up all coal that falls from the coal chutes pockets to the ground and place same on cars or engines as desired by the Railway Company.

(b) To break all coal to the size of four inch cubes or less before same is delivered to chutes or engines for engine use to unload all coal for stationary boilers.

(c) To unload wood from cars to storage piles located on Railway Company's right of way in said City.

(d) To load cinders from said Railway Company's right of way to cars, at points designated by said Railway Company.

(e) To unload sand from cars furnished by said Railway Company at points designated by said Railway Company.

Second. The Railway Company agrees to pay the Contractor in full compensation for services herein provided for, and the contractor agrees to accept the following rates to wit:

Nine (9) cents per ton for unloading coal from cars to chutes.

460 Nine (9) cents per ton for loading coal known as chute droppings from the ground to cars, Provided, that where the cars so loaded shall be unloaded into the chutes the railway company shall pay an additional six (6) cents per ton for unloading such coal from cars to chutes.

Ten (10) cents per cord for unloading wood from cars to the storage piles of said Railway Company, said storage piles being located on said right of way in said City of Enid.

Eight (8) cents per cubic yard for loading cinders on said railway company's right of way upon the cars furnished for same by said Railway Company at the place where said Railway Company places said cars.

Eight (8) cents per cubic yard for unloading sand on said Railway Company's right of way for use of its engines.

It is expressly understood and agreed that the payment for all services in handling said coal from cars, said coal from ground under chutes, known as chute droppings, said wood from cars for storage piles; said cinders for cars; said sand for engine purposes, shall be made upon the estimate and records of the Railway Company as to the amount of coal handled from cars, coal handled from the ground under chutes, wood handled from cars to storage piles, cinders loaded into cars and sand handled for use of engines.

Third. The contractor shall at all times maintain a sufficient supply of coal in the pockets of the coal chutes at Enid, Oklahoma, for the requirements of the Railway Company and shall break or crack all coal to sizes suitable for burning as shall be required by the Railway Company.

Fourth. The Contractor hereby expressly assumes all liability for all injuries to, or death of persons in his employ, and all liability for injury to, or loss of, his property which may occur in the performance of this agreement whether the same shall be occasioned by reason of the negligence of the Railway Company, its agents and employes, or otherwise, and the Contractor further covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, losses, and recoveries, for or on account of any such injury to or loss of property, or  
461 for or on account of any injury to or death of persons in the employ of the contractor when and while said persons may be in, upon, or about the cars, engines, trains, tracks and premises of the Railway Company, and any injury to said contractor while

performing any services under this contract, which might be or have been delegated to his agents or employes.

The contractor further expressly assumes all liability for injuries to or death of third persons, including the employees of this Railway Company, and all liability for injury to or loss of the property of such persons, which may be occasioned by any act of omission or commission, negligent or otherwise of the contractor, his agents, servants and employes, while engaged in the performance of this agreement, and the contractor covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, costs and recoveries for or on account of any such injuries or death of third persons, or for or on account of injuries to or loss of property thereof. And the contractor further covenants and agrees that the railway company shall not be liable in case of his death or injury while employed in the work herein set forth.

Fifth. The Contractor shall be punctual in the performance of his duties under this contract, and shall keep a sufficient number of men employed to unload the coal from cars into the coal chute pockets without unnecessary delay, and without causing the Railway Company any inconvenience or damage.

Sixth. This contract shall begin on the date hereof, and shall continue until terminated, as it may be by either party giving to the other fifteen (15) days' notice, in writing, of an intention to terminate the same, which notice shall specify the date on which the same shall terminate, unless said contract shall be sooner terminated as hereinafter provided.

462 Seventh. If at any time the Contractor shall fail, refuse or neglect faithfully to perform his duties under this contract, it is hereby agreed that the Railway Company shall have the right and option to at once terminate this contract, without being liable in damages therefor to said Contractor. The Railway Company, acting by its General Manager, or other agent, authorized by him, shall be the sole judge as to whether the Contractor is faithfully and satisfactorily performing the duties herein prescribed to be performed by him.

Eighth. The Railway Company agrees to furnish for the use of the Contractor, in performing the services required hereby, the necessary tools, including shovels, coal picks, lanterns, torches and oil for use of the men employed in handling coal through the chutes at Enid, Oklahoma. All such tools, supplies and appliances shall be and remain the property of the Railway Company, and at the termination of this contract shall be returned to the Railway Company by the Contractor, in good order and condition, ordinary wear and tear resulting from the proper use thereof excepted, and excepting also the oil properly used in order to carry out the provisions of this contract. In the event that any such tools or appliances shall be destroyed or injured so that they are unfit for use by any act of the Contractor or his employes, or if they shall be lost or stolen, then in either case, the Contractor agrees to pay the Railway Company the cost of said tools or appliances so destroyed,

damaged lost or stolen, and agrees that the Railway Company may deduct the amount of such cost from any payment or payments to be made by it to the Contractor.

463 Ninth. It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.

Tenth. The Railway Company shall keep a record of all coal delivered at the coal chutes at Enid, Oklahoma, for unloading, giving car numbers and the number of tons of coal in each car unloaded shall be determined by the billing of such car, and the Railway Company shall make settlements and pay the Contractor for handling such coal upon the basis of such handling. The Contractor shall make daily reports of the cars unloaded by him, and shall receive, collect and deliver to the duly authorized representative of the Railway Company, a ticket from each engineman, hostler or other employe, showing the number of tons of coal delivered to any engine.

Eleventh. Payment for the work to be performed under the contract by the Contractor shall be made by the Railway Company monthly, on or before the twentieth day of each month, next succeeding that in which the work is performed.

Twelfth. This contract and all the terms and conditions, rights and obligations thereof shall inure in favor of and be binding upon the heirs, administrators, executors, legal representatives and successors and assigns and lessees of both parties hereto; but the Contractor agrees that he will not assign or sublet any of the work herein provided for without the written consent thereto of the Railway Company.

In witness whereof, the Contractor has hereunto set his hand and seal and the Railway Company has caused this contract to be signed by its proper officer and its corporate seal to be affixed and attested, the day and year first above written. Executed in duplicate.

[SEAL.]

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,  
By WM. CUTENLAS,  
*Its General Manager.*

Attest:

CARL NYGUST,  
*Asst Secretary.*

W. L. TURNER,  
*Party of the Second Part.*

464 Witnesses to the signature of Party of the Second Part:  
JAMES S. MAN,  
JOHN R. WYSINGER.

Form Approved:

THOS. R. BEEMAN,  
*Ass't General Attorney.*

Form G. 62 attached marked approved:

R. J. ROBERTS.

As to Form:

JOHN HENRY.  
T. H. BEACON.

### EXHIBIT B.

#### Copy.

This agreement made in duplicate and entered into this first day of October, 1911, by and between the Chicago, Rock Island and Pacific Railway Company, hereinafter designated "First Party" party of the first part, and W. L. Turner of Enid, Garfield County, State of Oklahoma, hereinafter designated "Second Party" party of the second part, witnesseth:

Whereas, the first party owns and operates a line of railroad into and through the City of Enid, Garfield County, Oklahoma, and is engaged in transporting, among other things, grain in bulk, and

Whereas, in the transportation of such grain, it is necessary that the cars used therefor be prepared or coopered in a certain manner, so as to contain and prevent loss to such grain, and

Whereas, the first party is desirous of having all cars necessary for use in such transportation at the City of Enid, Oklahoma, so prepared and coopered, in accordance with its rules and regulations with reference thereto; and,

Whereas, the second party is willing to perform such service for compensation, in the manner and upon the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises and of the stipulations and agreements herein contained to be by the parties hereto respectively kept and performed, it is mutually agreed as follows:

First. The second party shall prepare and cooper all cars which the Round House Foreman of the First Party, at Enid, Oklahoma, may direct to be so prepared, in the manner and in accordance with the following rules to wit:

(a) Installing and Burlapping Grain Doors: Apply three Standard grain doors to each car door and fasten to posts using four No. 8 common wire nails in ends of each grain door. Cover with 7½ oz. burlap, one strip 8 feet long, 40 inches wide, and one strip 8 feet long, 20 inches wide, allowing it to overlap ends of grain door 6 inches and hang loose at bottom, overlapping car floor 10 inches; also lap two inches where strips are joined on the doors. Attach burlap by applying two No. 3 lath lengthwise where same is joined and two lath at top. Burlap at ends of grain doors to be secured

with one-half lath at each end. Use five No. 4 common wire nails to each full lath.

(b) *Burlapping Ends of Cars*: Apply one strip of  $7\frac{1}{2}$  oz. burlap 12 feet long and 40 inches wide at each end of car, allowing it to hang loose at bottom and overlap car floor 10 inches, extending around each corner of the car and overlapping the sides 21 inches. Secure to end and side of car with four No. 3 common lath applied at top and ends of burlap, using five No. 4 common wire nails to each full lath.

(c) *Burlapping King Bolts*: If King bolts protrude through floor of car, place one strip of  $7\frac{1}{2}$  oz. burlap 20 inches wide and 40 inches long, doubled over each bolt and secure with lath.

(d) *Patching Defects in Floor and Lining of Car*: Place a piece of burlap over opening or defect and nail a board over same of proper size, allowing the burlap to extend over several inches around the edges of the board.

(e) *Cars Unfit for Grain Loading*: Cars with broken end parts, loose side sheathings, leaky roof or other defects, making them unsuitable, must not be coopered for grain loading.

466 (f) *Making Lining and Sheathing of Car Grain Tight*: Attention must be given to crevices and openings around the side posts and body braces at the belt rails. Where these posts and braces and brace rods pass down behind the linings, crevices are frequently found; these should be calked with oakum or some like material to prevent grain from leaking behind the lining. A strip of burlap should be applied to the sides of the car 36 inches long and 20 inches wide, just over the body bolster, on account of the strain that is on car at this point, frequently causing sheathing leaks.

(g) *Apply Inspection Card (Form 333) to Cars for Grain Loading*: Inspector's Card (Form 333) must be placed on the car showing that it has been placed in condition for grain loading. This card to show the name of the Inspector, station at which inspected, date, car number and initials.

Second. That all cars so prepared by the second party shall be inspected by the Round House Foreman of the first party at Enid, Oklahoma, who shall be the sole judge as to whether such preparation is in accordance with this contract. If it be determined by said Round House Foreman that the preparation of such cars is insufficient and not in accordance with the rules herein stated, the second party will do every thing necessary to make the same conform to said rules.

Third. The first party will furnish to the second party all materials, of every kind, and will pay to the second party, for the services rendered, thirty (30) cents for each car so prepared and coopered by him, such payment to be made on or before the 20th day of the month next succeeding that in which the service is performed.

Fourth. The second party agrees in all respects, to fully indemnify, save and keep harmless the first party from any and all liability, loss, damage or injury of any kind whatsoever to the property

467 of the first party, or to the property of others in its possession, as a common carrier or otherwise, or to the property of others

on or adjoining its right of way, or on account of injury or death of the employes or passengers of the first party, or on account of injury to or death of others, arising from or in any manner caused by or growing out of the preparation of cars for cooping and connection with the cooping of cars as provided herein, including the installing and burlapping of grain doors, burlapping the ends of the car, burlapping of king bolts, patching defects in the floor of car or lining car or during general repair of car to make the same fit for holding grain or in connection with such repair, or making lining or sheathing of car grain tight or in connection with any other work or preparation in and about cars as covered by this contract, during the life of the same, irrespective of whether or not such liability, loss, damage or injury shall arise from the negligence of any such employees, passengers or persons.

Fifth. This agreement shall be effective from and after the date of its execution, and shall continue in full force and effect until terminated by either party hereto giving to the other thirty (30) days' notice in writing of its intention to so terminate the same.

In witness whereof, the first party has caused this agreement to be executed in its name and by its authorized officers and its corporate seal to be hereunto affixed and attested by its Secretary, and the second party has hereunto set his hand and seal on this, the day and year hereinabove written.

[SEAL.]

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,  
By C. A. JONES,

*Its General Manager.*

Attest:

CARL NYGUST,  
*Ass't Secretary.*

W. L. TURNER.

[L. s.]

Witnesses:

T. H. WALLACE,  
J. A. BOWMAN.

Form Approved:

THOS. R. BARNUM,  
*Ass't General Attorney.*

Form G, 62 attached on which is written: Approved, R. J. Roberts,  
as to form, J. M. Gee, T. H. Beacon.

468 (Endorsed as follows:) A. P. Bond, Administrator of  
W. L. Turner v. C. R. I. & P. Ry. Co. Petition. Filed Jun-  
4, 1913. Geo. M. Seifres, Clerk District Court, 1:30 p. m. Lien  
claimed for John C. Moore.

469 That thereafter, and on the 24 day of June, 1913, the  
defendant, the Chicago, Rock Island and Pacific Railway Com-  
pany filed in said court its petition to remove said cause to the United  
States District Court for the Western District of Oklahoma, which  
petition is in the words and figures as follows:



In the District Court of Garfield County, State of Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

*Petition for Removal.*

To the Honorable District Court in and for Garfield County, State of Oklahoma:

Comes now your petitioner, The Chicago, Rock Island and Pacific Railway Company, the above named defendant, by its attorneys, and respectively represents to this Honorable Court:

First. That on the fourth day of June, 1913, the above named plaintiff commenced this action in this court to recover the sum of thirty five thousand (\$35,000.00) Dollars, damages alleged to have been sustained by the widow and children of William L. Turner, deceased, by reason of the death of said William L. Turner, while crossing the yards and station grounds of this defendant at the City of Enid, Oklahoma.

Second. Your petitioner further avers that the time has not elapsed within which the defendant is required by the laws of the State of Oklahoma, or by the rules of the said District Court of Garfield County, in the State of Oklahoma, to answer or plead to the petition of the plaintiff herein.

Third. Your petitioner avers that the plaintiff, A. P. Bond, Administrator of the estate of William L. Turner, deceased, was at the time of the commencement of this suit, ever since has been and still is, a citizen of the State of Oklahoma, and residing in Garfield County, within the Western District of the State of Oklahoma; that  
470 the Chicago, Rock Island and Pacific Railway Company, the defendant herein, was at the time of the institution of this suit, ever since has been and now is a corporation organized under and by virtue of the laws of the States of Illinois and Iowa, with its principal place of business at the City of Chicago, in said State of Illinois, and was at the time of the commencement of this suit, ever since has been and still is a non-resident and non-citizen of the State of Oklahoma.

Fourth. Your petitioner shows to this Honorable Court that this is a suit of a civil nature and that the amount in controversy in this cause exceeds the sum of three thousand dollars (\$3,000.00) exclusive of interest and costs, and that the controversy herein is between citizens of different states.

Fifth. Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, conditioned that it will, within thirty days from the filing of this petition, enter in the

District Court of the United States for the Western District of the State of Oklahoma a certified copy of the record in this suit and for the payment of all costs that may be awarded against it by the said United States District Court if said United States District Court shall hold that said suit was wrongfully or improperly removed thereto.

Sixth. Your petitioner further states that notice of the filing of this petition and of the bond herein, has been duly served upon the opposing party as required by law.

Seventh. Your petitioner further avers that the said William L. Turner, deceased, for whose death this suit is brought, was not at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the States, or engaged in interstate commerce.

Eighth. Your petitioner further prays that this court proceed no further herein except to make the order for removal as required by law and to accept the bond presented herewith and direct a certified copy of the record in this suit to be made for said court as provided by law, and as in duty bound your petitioner will ever pray.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY.

By C. O. BLAKE,

H. B. LOW,

R. J. ROBERTS,

J. G. GAMBLE, AND

ROBERTS & CURRAN,

*Attorneys for Petitioner.*

STATE OF OKLAHOMA,

*County of Garfield, ss:*

I, J. G. Gamble, of lawful age, being first duly sworn, upon my oath depose and say: That I am an agent and attorney of the above named defendant. The Chicago, Rock Island and Pacific Railway Company, and as such authorized to make this affidavit for and on behalf of said petitioner; that said defendant, The Chicago, Rock Island and Pacific Railway Company is a foreign corporation and not a resident of the state of Oklahoma, and that there is no managing officer of said defendant in Garfield County, in said State; that I have read the above and foregoing petition for removal and the facts stated therein are true as I verily believe, further affiant sayeth not.

J. G. GAMBLE.

Subscribed and sworn to before me this 24 day day of June, 1913.

GEO. M. SCIFRES,

*Clerk District Court.*

Endorsed as follows: #1452. In the District Court of Garfield County, Okla. A. P. Bond, Adm'r Pl'ff, vs. The C. R. I. & P. Ry. Co., Deft. Petition for Removal and Notice. Filed Jun- 24, 1913. Geo. N. Scifres, Clerk District Court. "chg"

Case No. 1452.

Style of Case:

A. P. BOND, Adm. W. L. Turner, Deceased, Plff.  
vs.  
CHICAGO, ROCK ISLAND AND PACIFIC RY. CO., a Corporation, Deft.  
Attorneys, John C. Moore.

Kind of Action: Suit of Damages.

Case No. —.

Date of Filing, Month, day, year: June 4, 1913.

Deposit: \$10.00.

Paid by:

Bond for cost.

Date of Order, 7-19-13.

Orders of Court:

Motion to remove cause from State Court sustained on ground that the allegations of the petition show plaintiff's decedent to have been an independent contractor and not an employee as contemplated in the Employers' Liability Act—Exception to plaintiff.

Process, Service, etc., —.

In the District Court of Garfield County, Oklahoma, Twentieth Judicial District.

STATE OF OKLAHOMA,  
Garfield County, ss:

I, Geo. M. Scifres, Clerk of the District Court do hereby certify that the foregoing is a true and correct copy of the original entry on Judges' Bar Docket on file and of record in my office at Enid, Okla.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court at Enid, Oklahoma, this the 11 day of July, 1914.

[SEAL.]

GEO. M. SCIFRES, Clerk,  
By — — —, Deputy.

473 And afterward, to wit: on the 11 day of October, 1913, there was filed in the said court an order of the District Court of the United States for the Western District of Oklahoma, remanding the said cause to the said District Court of Garfield County, Oklahoma, which order and its authentication are in the words and figures as follows:

THURSDAY.

Be it remembered that heretofore to wit: in September 18, 1913, the same being a day of the special Guthrie Term, 1913, of the District Court of the United States for the Western District of Oklahoma,

the following proceedings among others, were had by said United States District Court, Honorable John H. Cotteral, presiding, as appears of record in my office.

No. 1174.

"A. P. BOND, Administrator, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Now on this 18 day of September, 1913, this cause coming on for further hearing upon the motion of the plaintiff to remand this cause to the District Court of Garfield County, Oklahoma. The plaintiff is present by his attorney, John C. Moore, Esq., and the defendant is present by its attorney, J. G. Gamble, Esq. Thereupon the court now being duly advised in the premises, it is ordered that said motion to remand be and the same is sustained, and this cause be, and the same is hereby remanded to the District Court of Garfield County, Oklahoma, at the costs of the defendant, to which order and ruling the defendant duly excepts.

474 UNITED STATES OF AMERICA.  
*Western District of Oklahoma, ss:*

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the attached to be a full, true and complete copy of original order remanding the case of A. P. Bond, Administrator, Plaintiff, vs. The Chicago, Rock Island and Pacific Railway Company, a corporation, Defendant, No. 1174, in this court, to the District Court of Garfield County, Oklahoma, as the same appears in the record of the proceedings of said court on Thursday, September 18, A. D., 1913, Honorable John H. Cotteral, presiding.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Guthrie in said District his 10th day of October, A. D., 1913.

ARNOLD C. DOLDE, *Clerk.*  
By W. W. HAWS, *Deputy.*

Seal of the United States District Court, Western District of Oklahoma.

Endorsed as follows: #1452. A. P. Bond, Adm., vs. C. R. I. & P. R. Co. Cause remanded to Garfield County Dist't Court. Filed Oct. 11, 1913. Geo. M. Seifres, Clerk District Court. "Chg."

5  
*Certificate of Counsel.*

I, John C. Moore, counsel and attorney for defendant in error in foregoing named cause in the Supreme Court of Oklahoma hereby certify that the above and foregoing sets out truly and correctly the

original petition and its exhibits filed in this cause in the District Court of Garfield County, Oklahoma. The petition of the defendant in that court for removal to the United States District Court for the Western District of Oklahoma the order of the Garfield County District Court removing said cause into said United States Court, and the Order of said United States District Court remanding said cause to the said Garfield County District Court, and includes only such matters as the Supreme Court of Oklahoma ordered to be included in the completion of the case made in this case.

Dated this 14 day of July, 1914.

JOHN C. MOORE,

*Attorney for A. P. Bond, Defendant in Error.*

476 In the District Court of Garfield County, Oklahoma.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Defendant.

*Certificate of Court.*

I, James W. Steen, Judge of the above entitled court, and trial judge in the trial of the above styled and numbered cause.

Hereby certify that I have examined the above and foregoing amendments to the case-made and find that the same contains a full, true, and correct and complete record and copy of the original petition and its exhibits filed in this court on the fourth day of June, 1913, and of the petition of of the defendant therein, the Chicago, Rock Island and Pacific Railway Company for removal of said cause to the United States District Court for the Western District of the State of Oklahoma, also a true and certified copy of the order of this court removing said cause to said United States Court, and a full true and correct copy of the order of the said United States District Court remanding said cause to this Court.

And it appearing that the said case made was by the order of the Supreme Court of Oklahoma ordered amended as herein set out, and that time of thirty five days was allowed to make said amendments and notice of five days on the said defendant, and it appearing that said thirty five days have not elapsed since said order was made on the 7 day of July, 1914, and that the five days' notice

477 has been given as said order required, I now hereby sign, settle and allow the above and foregoing amendments as true, complete and correct record and amendments of case made in said cause, and the clerk of this court is hereby directed to attest and file the same of record in the above entitled cause in this court and having so done to deliver the same to the Attorney of record for

the defendant in error for filing in the Supreme Court of the State of Oklahoma.

Given under my hand and the seal of the court, on this 27 day of July, A. D. 1914.

[SEAL.]

JAMES W. STEEN,  
*Judge of the District Court within and for  
Garfield County in the Twentieth Ju-  
dicial District of Oklahoma.*

Attest:

GEO. M. SCIFRES, *Clerk.*

Filed Jul- 27, 1914. Geo. M. Scifres, Clerk District Court. Chg.

Endorsed: #6528—In the Supreme Court of the State of Oklahoma—The Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiff in error—vs.—A. P. Bond, Administrator of the Estate of William L. Turner, Deceased, Defendant in error—Amendments to case made.

478 And thereafter, at the October, 1914, Term of said Supreme Court, on the 20th day of October, 1914, the following proceeding was had in said cause, to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,

vs.

A. P. BOND, Adm'r, Defendant in Error.

And now on this day it is ordered by the court that plaintiff in error herein, be required to give additional supersedeas bond within ten days' time, and the cause is continued for the term.

479 And thereafter, at the January, 1915, Term of said Supreme Court, on the 15th day of January, 1915, the following proceeding was had in said cause, to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,

vs.

A. P. BOND, Adm'r, Defendant in Error.

And now on this day the above cause is argued orally, and the cause is submitted on the record, briefs and oral argument.

80 And thereafter, at the April, 1915, Term of said Court, on the 13th day of April, 1915, the following proceeding had in said cause, to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,  
 vs.  
 A. P. BOND, etc., Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds, that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be and the same is hereby affirmed.

Opinion by Turner, J.

All the Justices concur, except Brown, J., not announcing.

481 Filed Apr- 13, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6528.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

v.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased, Defendant in Error.

1. Where a suit in damages for personal injuries was based upon the theory that deceased was entitled to the benefits of the Federal Employers' Liability Act (35 St. at L. 65): that defendant was engaged in interstate commerce; that deceased was an employee of defendant and engaged therein at the time of his death and that defendant's negligence, among other things, consisted in operating its train which killed deceased in violation of the Federal Safety Appliance Act of March 2, 1893, as amended by Acts approved April 1, 1896 and March 2, 1903, and, where defendant pleaded, among other things, that deceased was an independent contractor, and stood on a written contract existing between defendant and deceased at the time of his death. Held: That whether he was or was not an independent contractor, was a question of law for the court to be determined from the face of the contract construed in the light of the surrounding circumstances.

2. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.

3. Where at the time he was killed, deceased had a contract in writing with the defendant company obligating him, at his own cost but for no specific time, to furnish all labor necessary to handle all coal required by the company at Enid and to unload the same

from its cars to its coal chutes and pick up all coal dropped in so doing "and place the same on cars or engines where desired" by the company; also to break it into certain dimensions and unload "all coal for stationary boilers; also to unload wood from cars to storage piles in its yards there and to load cinders on its right of way at points designated by the company"; also to be punctual and to discharge his duties thereunder without delay or inconvenience to the company and should he fail, neglect or refuse to perform the contract, the company had the right to terminate the same at any time without being liable in damages therefor; the company to be the sole judge as to whether he faithfully and satisfactorily performed the same; all tools to do the work were to be furnished by the company and returned by deceased at its termination; the company to keep a record of all coal delivered at the chutes for unloading and deceased to make daily reports of the cars unloaded under the contract and receive, collect and deliver to the authorized agent of the company a ticket from each engineman or other employee, showing the number of tons of coal delivered to any engine, and not to sublet the work without the written consent of the company. Held, That the relation existing between deceased and defendant thereunder was that of master and servant and not proprietor and independent contractor, and this too although the contract provided: "It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing of such work other than as to the result to be accomplished."

482 4. Where in a suit in damages for personal injuries based upon the Federal Employers' Liability Act (35 St. at L. 65) one defense was that although defendant was engaged in interstate commerce deceased, if an employee of defendant, was not engaged in interstate commerce at the time he was killed, and where the contract existing between them in effect constituted deceased an employee of defendant at work in its yards at Euclid at the time he was killed; and the evidence reasonably tended to prove that his duties were to unload cars of coal into its chutes and to unload the same from there into the tenders of its engines engaged in hauling its interstate and intrastate trains; that a record of the coal thus unloaded and loaded was kept in the shape of tickets deposited in boxes at the chutes; that it was the duty of deceased each day, between four and six o'clock, to turn these tickets in the nature of a report over to an agent of defendant at its freight house some distance up its tracks northward from its chutes; and that while crossing the tracks on his way to the freight house so to do he was run over and killed by one of defendant's backing trains, held: That the evidence was sufficient to take to the jury the question of whether deceased was killed while engaged in interstate commerce.

5. Evidence Examined and Held that, as the same reasonably tends to prove that the engineer knew or ought to have known when he first saw deceased deflecting on the track in front of him that he would be upon the track when the train reached him and could have avoided injuring deceased by the exercise of proper care had



the train been running at a lawful speed, the question of defendant's negligence was for the jury.

6. Evidence Examined and Held that, as the same reasonable tends to prove that the engineer failed, while running the train question, to use and operate the continuous train power brake, which the train was equipped, in violation of the Federal Safety Appliance Acts of March 2, 1893, as amended by Acts approved April 1, 1896 and March 2, 1903, the question of whether he did or not was for the jury.

(Syllabus by the Court.)

Error from the District Court of Garfield County.

James W. Steen, Judge.

Affirmed.

C. O. Blake, R. J. Roberts, W. H. Moore, J. G. Gamble, and K. W. Shartel, Attorneys for Plaintiff in Error.

John C. Moore, Attorney for Defendant in Error.

483

*Opinion of the Court.*

By TURNER, J.:

On June 4, 1913, defendant in error, A. P. Bond, as administrator of the estate of William L. Turner, Deceased, sued plaintiff in error, Chicago, Rock Island & Pacific Railway Company, in the District Court of Garfield County, in damages for personal injuries resulting in the death of his intestate. The suit was brought under the Federal Employers' Liability Act (35 St. at L. 65), and upon the theory that defendant was engaged in interstate commerce; that deceased was an employee of defendant and engaged in interstate commerce at the time of his death and that defendant's negligence, among other things, consisted in operating its train, which killed deceased, in violation of the Federal Safety Appliance Act of March 2, 1893, as amended by Acts approved April 1, 1896 and March 2, 1903. On June 24, 1912, defendant petitioned to remove the cause to the United States Court for the Western District of Oklahoma, which refused to take jurisdiction, and the cause was remanded to the State court. After amended petition filed and demurrer thereto overruled, on November 14, 1913, defendant, after a general denial answered admitting its corporate existence and that it was engaged in interstate commerce and that deceased met death at the time and place set forth in the petition, but denied that he was an employee of defendant at the time and alleged that he was an independent contractor. There was trial to a jury and judgment for plaintiff and defendant brings the case here, assigning that the court erred in refusing to direct a verdict for defendant at the close of all the evidence. As the undisputed facts disclose that deceased was run over and killed by one of defendant's train of cars while it was backing in the company's yards at Enid, assuming that he was then and there in the discharge of his duties under the contract, the

question whether he was an independent contractor or simply  
484 an employee of defendant turns upon the construction of the contract, and is a question of law for the court. Chicago, R. I. & P. Ry. Co. v. Bennett, 128 Pac. 705. This sends us to the contract. But before we examine the contract it is contended by counsel for plaintiff that the question of whether deceased was an independent contractor is *res adjudicata* because, he says, the United States Court, in effect, held, in remanding the case to the State court, that such he was not and, further, that he, at that time, was an employee of defendant engaged in an act of interstate commerce and that such holdings are binding on this court. Plaintiff cites no authority in support of this proposition and as we can find none and are of opinion that the only question decided by that court, which is binding on this court, is that it had no jurisdiction in this cause, we pass to the construction of the contract. It is dated November 10, 1910 and therein deceased is called the "contractor." It obligates him, at his own cost but for no specific time, to furnish all the labor necessary to handle all coal ("required" by the company at Enid), from its cars to its coal chutes and to pick up the coal dropped in so doing "and place same on cars and engines as desired" by the company. Also to break it into certain dimensions and "to unload all coal for stationary boilers." Also to unload wood from cars to storage piles in its yards there and to load cinders from its right of way to cars "at points designated by" the company. It required him to be punctual in the discharge of his duties thereunder and to keep a sufficient number of men to unload the coal without unnecessary delay or inconvenience to the company and provides that the company shall not be liable for his death or injury while employed in the work. Also, that should he fail, neglect or refuse faithfully to perform the contract that the company reserves the right to terminate the same at any time without being liable in damages and to be the sole judge as to whether the contractor is "faithfully and satisfactorily" performing  
485 the same. All tools to do the work were to be furnished by the company and were to be returned by the contractor at its termination. It further provides:

"It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing such work other than as to the result to be accomplished."

Also, for the purpose of settling with the contractor, that the company would keep a record of all coal delivered at the chutes for unloading together with the number of tons in each car unloaded; that the contractor would make daily reports of the cars unloaded by him and "receive collect and deliver" to the authorized agent of the company "a ticket from each engineman, hostler or other employee showing the number of tons of coal delivered to any engine."

Closing, the contractor agrees not to sub-let the work without the written consent of the company. Aiding in the construction of this contract the surrounding circumstances disclose that the yards referred to are located at Enid and, between the company's engine

house on the south and Market Street crossing it at an obtuse angle on the north, is 3,100 feet long north and south and about 325 feet wide east and west. Running out of the engine house northward are four tracks; the distance from the engine house to the coal chute northeast on the right of way, is about 200 feet; on the right of way are numerous tracks some of which lead alongside this coal chute and from thence northward past stock-pens, some five hundred feet to the west, and a freight house and platform some four hundred feet long, about nine hundred feet from the stock-pens on the east, and the passenger depot some seven hundred feet from the freight house on the same side of the tracks and near Market Street on the north. The tracks east of the depot and freight house are nine in number and include the main line, the passing track and yard track and a water crane is located at the south end of the platform of the passenger depot, which is about five hundred and fifty feet long. From all of which it seems that this is the yard or right of way referred to in the contract and that the coal chute referred to in the contract is one hundred feet long and contains twenty-

486 two pockets. Also that the cinders which deceased thereby contracted to load might be located anywhere upon this yard; that the storage piles of cordwood might also be so located, as might the sand cars to be unloaded, and that the engines to which he was required under the contract to supply coal might get it while alongside the coal chute or might receive it anywhere upon the numerous tracks in this extensive yard. *Chicago, R. I. & P. Ry. Co. v. Bennett*, 36 Okla. 385 lays down the rules by which to construe this contract and determine from it whether deceased was an independent contractor or a mere servant or employee of the company. This was a suit in damages by plaintiff against the company for negligently injuring him while in its employ as servant. One of the defenses was that, at the time he was injured, he was an independent contractor. The facts were undisputed and his contract with the company lay in parol. At the time he was injured he was employed by defendant to unload cars of coal into the tenders of defendant's engines as they lay alongside and he was injured while so doing. His tools were furnished by the company. Defendant contended, we presume, for an application of the rule laid down in *The Singer Manf. Co. v. Rahn*, 130 U. S. 440, where that court held that the relation of servant existed only where the employer retained the right to say "not only what should be done but how it should be done," and insisted as plaintiff was paid by the tone that its station agent gave him no directions as to how he should unload the coal into the tenders, that he was an independent contractor. But in determining whether he was an independent contractor or not the court, quoting approvingly from *Thompson on Negligence* Sec. 622, said:

487 " \* \* \* In every case the decisive question is: Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? Does he reserve to himself the essential power of a master? It is but another form of language expressing the same idea to say that the true test to determine whether one who renders service to another does so as a contractor or not is

to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. On this question the contract under which the work has been done must speak conclusively in each case, reference being had, of course, to surrounding circumstances."

And from 4th Words and Phrases, 3542:

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own method, and without being subject to the control of his employer except as to the result of his work. *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564; *Indiana Iron Co. v. Gray*, 19 Ind. App. 565, 48 N. E. 803, 807."

"But", said the learned Commissioner, "the test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under the contract of employment, taking into account the circumstances and situation of the parties and the work, to so control and direct him in the work. *Moll on Independent Contractors*, 35; *Linnehan v. Rollins* 137 Mass. 123, 50 Am. Rep. 287. A case directly in point is that of *C. P. Hamilton v. Oklahoma Trading Co.*, 33 Okla. 81, 124 Pac. 38, and the numerous authorities cited and quoted from. See also *Chas. T. Derr Const. Co. et al. v. Gerruth*, 29 Okla. 528, 120 Pac. 253."

He further cites *Moll on Independent Contractors* at page 76, where it is said:

"The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work."

and at page 77,

"It was held in Massachusetts that the employer's intention to retain the right of exercising control, and hence creating the relation of master and servant, should always be inferred when it appears that the employment was general, and not based on a contract to do a certain piece of work on certain specified terms in a particular manner and for a stipulated price."

And, governed by these rules, held that the plaintiff in that case was not an independent contractor but an employee of the company.

If in that case plaintiff was held to be nothing more than a mere servant or employee, we cannot see how we can hold that he was other than that in this case. Considering the contract whole and construing it in the light of surrounding circumstances: Here is deceased who was given a shovel by the company and put to work unloading cars of coal into a chute, placed there by the company, with directions to also unload sand from its cars at point-on its right of way to be designated by the company when occasion should arise. He was also required, under his contract, to load cinders, at points to be designated by the company, from its right of way into its cars. Also to unload cord-wood where designated on storage piles

along its right of way. Clearly in order to know what cars to unload he would have to be told by the company and, when told, the company would so far superintend his work and control his action. And this too under the stipulation contained in the contract that he was liable to be discharged at any time or the contract terminated which is practically the same thing, at the pleasure of the company. We can see nothing more in the contract than that deceased was a common laborer, an employee of and under the control and supervision of the company and subject to discharge at the pleasure of the company.

It takes very little for courts to hold that one is subject to the control of another and hence a servant and not an independent contractor under the arrangements existing between them. In *Johnston v. Hastie*, U. P. Q. B. 232, one M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While doing so defendant, who lived a short distance away, came occasionally to see how the work was progressing, and on one occasion advised him to set fire to the log heaps. M. told him that a certain brush fence might take fire but defendant said it would make no difference. M. then fired the heaps and went home, during which time the fire spread and burned plaintiff's fences. It was held upon this evidence 489 that M. was not an independent contractor over whom defendant had no control but was his servant or employee. It seems the case turned on the act of control stated and defendant was held guilty of an act of negligence. In view of all of which we say that as the contract in question obligated deceased to furnish all labor "required" to handle all coal "furnished" by the company at Enid and to unload its coal cars in its coal shutes "and place on cars or engines as desired" by the company and "to unload all coal for stationary boilers" located not telling where on the company's right of way and to unload wood from its cars on storage piles in its yards there and to load cinders from its right of way to cars "at points designated by the company", a fair construction of the contract is that the company had the right, under the contract, to control and direct him in the work and that he was an employee of the company and not an independent contractor. Besides the contract characterizes him as an employee by reason of the fact that the intent of the contract is to reserve the right in the company to discharge him at its pleasure. Some of the cases hold that this in itself is sufficient to hold him to be an employee under the contract. In *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, D. was engaged by an oil company to bale cotton-seed hulls with its machinery at so much per bale. It exercised control over the manner in which he did the work. It had the right to discharge him at any time. It was there held that D. was an employee of the company. In *Steger v. Barrett*, 124 S. W. (Tex. Civ. App.) 174, the 5th syllabus reads:

"Where the operator of a corn sheller employed the owner of a traction engine to assist in shelling corn and to furnish power for the work at a specific sum per day for the use of the engines and for his services, the owner being subject to the orders of the operator and liable to be discharged at any time, the owner was not an 'inde-

pendent contractor", but was a servant of the operator, for whose acts the operator was liable.

490 See also *Western Union Tel. Co. v. Barclay*, 114 S. W. (Tex. Civ. App.) 156; *Bernauer and Ruh v. Hartman Steel Co.*, 33, Ill. App. 591; *Holmes Jr. v. Tennessee Coal etc. Co.* 49 La. Ann. 1465; *Burke Resp. v. The City & County Contract Co.*, Appellant, Impleaded with N. Y., W. & B. Ry. Co., defendant 133 App. Div. (N. Y.) 113., and the valuable and exhaustive note to *Messmer v. Bell etc. Co.*, 19 Ann. Cas. 1.

Not only did the contract reserve to the company the right to control and direct deceased in his work but it might be well to know, although we are only passing on the face of the contract, that the company, pursuant to the power therein reserved, did that very thing, which confirms us in our opinion, gathered from the face of the contract, that the same was no-capable of execution without such direction and control. Such amounts to a practical construction of the contract by the company. Mr. Bowman, station agent and yard-master of defendant, testified.

"Q. From whom did Turner get instructions about handling work performed by him?

A. Under his contract, from us.

Q. You directed him what to do?

A. Yes, either me or my chief clerk.

Q. So that he was under your supervision and control all the time?

A. In so far as his contracts were concerned, yes sir.

Q. He performed his duties in accordance with what you directed him to do?

A. Yes, sir.

Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island Coal?

A. Yes, sir."

We are therefore of opinion that, at the time he was injured, deceased was not an independent contractor but an employee of the company and is entitled to recover under the Federal Employers' Liability Act,—that is if, at that time he was "engaged in Interstate Commerce" within the contemplation of the Act.

491 The Act relied upon is entitled "An Act relating to the liability of Common Carriers by Railroads to their Employees in certain cases". That part pertinent to our inquiry provides:

"SECTION 1. That every common carrier by railroad while engaged in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative \* \* \* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is conceded that defendant at the time deceased was injured was engaged in interstate commerce and that the men in charge of the

train while backing were, at that time, employees of the company, but it is contended that as there was no evidence reasonably tending to show that deceased was at that time engaged in interstate commerce, he was not entitled to the protection of the act and the court should have directed a verdict for defendant upon this ground. On this point the evidence fairly discloses that, it was the duty of deceased to order coal for the chutes and, when the cars were placed along side, to unload the coal into the chutes and from there into the tenders of defendant's engines engaged in both intrastate and interstate commerce. It was also his duty to make daily reports of the cars unloaded by him and receive and deliver to a representative of the company a ticket from each engineman or other employee of the company showing the number of tons of coal delivered to any engine operated by the company. These tickets, when received by him, were kept in two boxes at the coal chutes and each day, between four and six o'clock in the afternoon, were turned in by him to Mr. Wallace, chief clerk of the company at the freight house. He also had a contract with the Enid Mill & Elevator Company, whose place of business abutted on the company's right of way some seven  
492 hundred feet diagonally across the tracks and to the northeast, and perhaps others, to unload coal from the company's cars consigned to them, for which no tickets passed. The evidence also discloses that on the day he was injured tickets had thus accumulated in the boxes at the coal chute and two such tickets were thereafter found by Mr. Wallace in the north box; that about four o'clock that afternoon Conway, who was assisting deceased in unloading a car of coal at the chutes left there and went to deceased, who was assisting in loading a car of coal for said elevator company on the yards near its plant, and informed him that he was through unloading whereupon deceased started back towards the chutes and disappeared among the cars standing upon the tracks; that he was next seen about five o'clock, at which time he was in the plant of said company and wanted to hire help to load said car; that he remained there perhaps twenty minutes and left going in a southerly direction down the tracks; that shortly thereafter he was seen by Henderson, the fireman of that concern, coming from that direction as he was standing on a pile of cinders at the south end of the plant; that when deceased joined him there, witness, who was engaged in hauling cinders from the boiler room, testified:

"A. Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think I would, and he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said: 'There is 24, I must go to the freight depot and take my coal tickets and order coal for the chutes,' then he turned around and walked off toward the freight depot."

The evidence further discloses that in making his way to the freight house deceased went south from where they were talking along and between the strings of cars standing on the tracks until he reached a point south of the north end of the freight house, where he turned and rounded the end of the string to his  
493 right, and, after perhaps crossing a track or two, walked northward between the tracks in order to get around the



north end of another string between him and the freight house; and that while so doing and when he was at a point east of the north end of the freight house an engine and two box cars and a flat car, backing on the track to his left in the direction in which he was going and running at about twenty-five miles per hour, and in excess of the speed prescribed by the city ordinance, ran over and killed him as he turned, without knowledge of its presence until too late, and attempted to cross the track in front of it. All of which reasonably tends to prove that the deceased was engaged in interstate commerce at the time he was killed. This for the reason that his contract required him to furnish the labor that coaled the engines and made the steam that created the power that sped the trains carrying both intrastate and interstate commerce on its way and that the turning in *out* the tickets to Wallace at the freight house was, in a manner, making his report to the company of what he had done, which was incident to his contract and within the scope of his employment. In other words we are of opinion, it being conceded that defendant was engaged in interstate commerce at the time, that so was deceased for the reason that at that time he was engaged in his master's business and was furnishing or in the act of attempting to furnish something to contribute thereto.

In *Darr v. Baltimore & Ohio Ry. Co.*, 197 Fed. 665, plaintiff was employed by defendant and was injured while in his service. He brought suit under the Employers' Liability Act and recovered a verdict. The defense was, as here, that he was not entitled to the benefits of the act in question because he was not engaged in interstate commerce when injured. The facts were that on the morning of the accident and shortly before it occurred, one of defendant's trains had been brought in from Brunswick, Maryland, through West Virginia to Cumberland, Maryland. Later in the day  
494 the train was taken back over the same route. Upon its arrival at Cumberland, the train was run on what was called the "fire track." A bolt had fallen out of the brake-shoe on one of the wheels of the tender as a result of which the brakebeam hung down in dangerous proximity to the rail and plaintiff was directed to make the necessary repairs while the tender was on the "fire track." While so doing he was injured as a result of the negligence of a fellow employee who had, contrary to directions of plaintiff and unknown to him, put the air on the brake. Under this state of facts it was held that as defendant was engaged in interstate commerce that plaintiff was engaged therein at the time he was injured within the meaning of the act and could maintain his suit. In that case if plaintiff, while replacing a bolt, was engaged in interstate commerce he would probably have been so held to have been engaged had he been run over by defendant's train while on his way to replace it with the bolt in his hand. On the strength of which we hold that deceased was engaged in interstate commerce while making his way to the freight house with these tickets in his hand. We say he had these tickets in his hand at the time he was killed for the reason that the evidence reasonably tends to prove that fact although they were never found, so far as the record discloses. Had they ever been



found after the injury under circumstances showing that he did not have them at the time, defendant would not have been slow to disclose that fact. Their absence can be accounted for and the jury might have fairly inferred from the evidence that after he left Conway at four o'clock to go to the coal chutes he got them and had them in his possession when at five o'clock he said to Hutchison that they must go and turn them in and started for the freight house and that they were blown away by the force of the high wind prevailing at that time or were otherwise lost in the excitement of the casualty.

We said that the taking of these tickets by deceased to the agent of defendant at the freight house was incident to his contract with the company and within the scope of his employment. When  
495 such is the case and the employee is injured while engaged in the execution of a duty thus incident he is entitled to the protection of the act. In *Carr v. N. Y. C. & H. R. R. Co* 136 N. Y. Sup. 501, plaintiff was a brakeman in defendant's employ as one of a crew on what was known as "pick up train No. 181," running between points in the State of New York. When the train reached Tonawanda there was in the train a number of cars loaded with freight destined and consigned to points outside the state and the train was engaged in both intrastate and interstate commerce. In the train was a car billed to North Tonawanda and another loaded with freight billed to another point in the state. Both of these cars were loaded and shipped from a third point in the state. Orders were given to the train crew to cut out these two cars at North Tonawanda and place them on the siding there. In cutting them out the plaintiff was directed to climb on top of one of them and set the hand brakes so they would not move after being placed on the siding. Owing to the fact that while so doing a fellow-brakeman was negligent in uncoupling the compressed air hose, the wheel used by plaintiff in setting the brake was caused to revolve rapidly in the opposite direction from those on cars in common use and the sudden reverse motion to operate so as to throw him from the car and injure him. It was held that he was engaged in interstate commerce within the contemplation of the act and was entitled to maintain his suit and that his work at the siding was merely incident to the operation of the train in interstate commerce. In *Illinois Central R. R. Co. v. Behrens*, Adm., etc., 233 U. S. 473, 58 L. ed. 1051, quoting approvingly from *Pederson v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125; 33 Sup. Ct. Rep. 648, the court, speaking to the act, said:

"There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce" \* \* \* "The true test always is: Is the work in question a part of interstate commerce in which the carrier is engaged?" \* \* \*

496 In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, the case turned upon whether the evidence reasonably tended to show that deceased was engaged in interstate commerce at the time he was killed. The court held that it did. The evidence disclosed that train 72 of the Southern Railroad Company

had come into Selma, N. C., from a point in Virginia and other points and that a "shifting crew" was "working" the train so as to take two cars from it and put them into a train that was to include these two cars and other cars to be hauled from Selma to a point in North Carolina by engine No. 862, upon which deceased was employed as fireman for the trip about to begin and had already prepared his engine for the trip. After inspecting, oiling, firing and otherwise preparing his engine for the trip, he left it and started across the tracks in the yard in the direction of his boarding house and was run over and killed by another train as a result of the negligence of his fellow-employees. The court said:

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson v. Delaware L. & W. R. Co.* 229 U. S. 146, 151, 57 L. ed. 1125, 1127, 33 Sup. Ct. Rep. 648; *St. Louis S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651.

"Again it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tends to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for that purpose, and that he had not gone beyonds the limits of the railroad yards when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 119, ante, 144, 147, 34 Sup. Ct. Rep. 26."

"We conclude that, with respect to the facts necessary to bring the case within the Federal Act, there is evidence that at least was sufficient to go to the jury. \* \* \*

497 In *St. Louis S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, the facts were that defendant was a Texas corporation owning and operating a railroad which extended from the Oklahoma line southward through North Sherman and other points in Texas and connected with the Oklahoma line which extended northward into Oklahoma through Madill and North Sherman. Deceased was employed by defendant as yard clerk in its yards at North Sherman. His principal duties were to examine incoming and outgoing trains and make a record of the number and initials on the cars, to inspect and make a record of the seals on the car doors, to check the cars by the conductor's lists and put cards or labels on the cars to guide the switch crews in breaking up incoming trains and making up

outgoing trains. His duties related both to intrastate and interstate commerce and at the time he was killed he was in the discharge of his duties and was on his way through the yards to one of the tracks therein to meet an incoming train from Madill. While so doing he was struck and fatally injured by a switch engine negligently operated by the employees in the yard. After stating the question involved to be whether the Federal statute was applicable and whether the injury complained of was sustained while the company was engaged and while deceased was employed by it in interstate commerce, the court said:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because the yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. *McNeill v. Southern Railway Co.*, 202 U. S. 543, 559. See also *Johnson v. Southern Pacific Company*, 196 U. S. 21."

From which we learn that, as the duties deceased was discharging there and here at the time he was killed related to both intrastate and interstate commerce, it was not incumbent on the plaintiff there or here to disassociate by proof the one from the other but that he was entitled to have the jury say whether at that time deceased was employed in interstate commerce, and that it will not do to say that, in as much as it is impossible to say whether deceased had in his hands tickets for coal supplied to engines engaged in interstate commerce or tickets for coal used by engines engaged in intrastate commerce, there is no evidence reasonably tending to prove that he was engaged in interstate commerce at the time he was killed. This for the reason that the cases cited support the view that, as the evidence fairly disclosed that the tickets were for coal supplied to engines engaged in both intrastate and interstate commerce, it might be fairly inferred that deceased was engaged in an act of both intrastate and interstate commerce at the time he was killed and hence came within the protection of the act or that the evidence was at least sufficient to take the question to the jury of whether he was or not. Besides, in the conversation with Hutchinson before he started, he said that he must go to the freight house and take the tickets and order coal for the chutes. This was sufficient to characterize his act in going as one pertaining to interstate commerce for the reason that the coal he was talking about was for the use of defendant's engines engaged in both intrastate and interstate commerce and not for the exclusive use of either. We are therefore of opinion that the evidence reasonably tends to

prove that the deceased was engaged in interstate commerce at the time he was killed and the court did right to overrule the motion to direct a verdict for defendant—that is, if the evidence was sufficient to take the case to the jury on the question of defendant's negligence.

On this point in addition to what has been said, the evidence reasonably tends to prove that as deceased was walking north between the tracks track number three on his right and track number two track number one, the passing track, the main track and the house track were on his left, all thirteen feet apart; that while walking thus passenger train No. 24, to which he had referred in his —  
499 with Hutchison, passed him going south on the main track and stopped at the passenger depot just beyond him; that back from the same direction on track two came backing freight No. 2113, consisting of an engine and tender and two box cars and a flat car at a speed of something like twenty-five miles per hour in violation of the City ordinance. It is fair to presume that his attention was attracted by the train which had just passed and that he was unaware of the approach of this freight, which was in charge of an engineer, fireman and two brakemen, the brakemen upon the end of the car nearest the deceased and one of them seated facing north on the northwest corner of the flat car. Although plaintiff in his petition bases his right to recover on some twenty specific grounds of negligence, including the allegation that defendant, at the time of the accident, had violated the Federal Safety Appliance Act, *supra*, in failing to use the continuous train power brake, with which the engine and cars inflicting the injury were equipped, the court, in effect, peremptorily instructed the jury that plaintiff could not recover on any of them except that ground and the further alleged ground of defendant's failure to exercise reasonable care to stop the train, after the peril of deceased was discovered by those in charge. Of course, if there was no evidence reasonably tending to prove that, after the peril of deceased was discovered, the train could have been stopped by defendant in the exercise of ordinary care and the injury averted, had it not been running in excess of the speed of ten miles an hour as prescribed by the ordinance, the court erred in sending the issue to the jury. On this point the evidence further discloses that, being unaware of the close proximity of this backing freight, deceased, ~~defeating~~ his course to the northwest stepped upon the track within some seventy-five feet of it and, continuing diagonally between the rails, was in the act of placing his left foot outside the west rail when he was struck by the train and killed. Now here is a defendant, running at an  
500 unlawful speed, in a city yard of nine tracks, where from around or through the strings of parallel cars in close proximity on each side, a man might step upon the track in front of it at any moment, *nacking* its cars over a man rightfully on the premises and unconscious of danger, and contending that such was not negligence, and if it was, the same was not the proximate cause of the injury. In thus contending, defendant might be

likened to a man throwing a missile along a crowded thoroughfare and insisting, after a pedestrian, unconscious of the throw, had turned into it and been injured, that no negligence could be attributed to the thrower and that the negligence of the person struck was the proximate cause of his own misfortune. It is sufficient to say concerning this assignment that, as there was evidence reasonably tending to prove that the engineer knew, or ought to have known when he first saw deceased deflecting towards the track in front of him, that he would be upon the track when the train reached him, and could have avoided injuring deceased by the exercise of proper care, had the train been running at a lawful speed, and hence his failure to do so was the proximate cause of the injury, the court did right to send the issue to the jury. A similar situation existed in *St. Louis & S. F. R. Co. v. Kral*, 31 Okla. 624, except that the train was not running at improper speed. There the railroad and the dirt road converged at an angle of about forty-five degrees. Before the train had reached the point Kral was seen driving his team and converging on the track at that point and both the train and Kral continued to converge and collided on the crossing. Kral invoked the doctrine of the last clear chance, the company contended, as here, that there was no evidence reasonably tending to prove that the negligence of the company was the proximate cause of the injury. We said:

"At the time plaintiff was first seen by the engineer if he knew or ought to have known that the plaintiff would be upon the crossing when the train reached it, and could have avoided the collision, his failure so to do was the proximate cause of the injury, and plaintiff is entitled to recover, otherwise not. And if, in applying this rule to the evidence reasonable men might differ, the question is one of fact for the jury."

And so we say here. At least there was evidence reasonably tending to prove that after seeing him in peril those in charge could have stopped the train and avoided the injury had the train been  
501 running within the speed prescribed by the ordinance.

Although the court in the 11th instruction may not have correctly defined negligence, the court did correctly define what defendant's duties were in connection with the doctrine of the last clear chance, which was all defendant was entitled to. The court said.

"The court instructs the jury that if they find and believe from the evidence that immediately prior to receiving the injury, which caused his death, the deceased, William L. Turner, was walking between tracks 2 and No. 3, in the switch yard at Enid, and that while without looking or listening for an approaching train, he stepped from a position of safety to one of peril and was killed then your verdict must be for defendant, unless you further find that after he reached a position of peril, and such peril was discovered by the employees of the railroad company, such employees failed to use the care and caution that prudent persons would use under the same circumstances to avert the injury."

We say all defendant was entitled to, it was more than it was entitled to under the rule laid down in the Kral case, *supra*, and besides, as the element of unlawful, speed of the train was omitted from the charge, it was a wonder plaintiff recovered at all.

Neither can we say that there was no evidence reasonably tending to prove that the engineer failed, while running the train in question, to use and operate the continuous train brake with which the same was equipped. This for the reason the engineer received the signal while deceased was on the track forty feet away and, according to the test made by the company could have stopped his train by a proper application of the brakes within 120 feet. As it was the evidence reasonably tends to prove that he did not stop short of a distance of 360 feet. Hence instructions Nos. 10, 16 and 18 which left the question of whether he did or not to the jury were proper. Nor is there merit in the contention that the court erred in withdrawing instruction No. 39 after it had been given, which in effect told the jury that plaintiff could not recover on that ground. It is sufficient to say of the instructions as a whole that, except as noted, they fairly state the law and for that reason and that we find no error in the record, the judgment of the trial court is

Affirmed.

All the Justices Concur, except Brown, J., not announcing.

502 And thereafter, on the 29th day of April, 1915, the following proceeding was had in said cause, to wit:

#6528.

C., R. I. & P. R. Co., Plaintiff in Error,

vs.

— BOND, Defendant in Error.

And now on this April 29, 1915, it is ordered by the court that the mandate herein be stayed for five days to allow plaintiff in error opportunity to apply for leave to file petition for rehearing out of time.

503 In the Supreme Court of the State of Oklahoma.

*Certificate.*

I, William M. Frankoin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 502 pages, numbered from 1 to 502, both inclusive, are a full, true and complete transcript of the record and all proceedings in cause No. 6528, The Chicago, Rock Island and Pacific Railway Company, Plaintiff in error, versus A. P. Bond, Administrator of the Estate of William L. Turner, deceased, Defendant in error, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said

Supreme Court, at Oklahoma City, Oklahoma, this 21st day of May, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,  
*Clerk Supreme Court, State of Oklahoma.*

Endorsed on cover: File No. 24,760. Oklahoma Supreme Court Term No. 486. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. A. P. Bond, administrator of the estate of William L. Turner, deceased. Filed June 7th, 1915. File No. 24,760.



Office Supreme Court, U. S.

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JAMES D. MAHER

CLERK

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In the Supreme Court of the  
United States

October Term, 1915

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The Chicago, Rock Island and  
Pacific Railway Company,

*Plaintiff in Error,*

vs.

A. P. Bond, Administrator of the  
estate of William L. Turner,  
Deceased,

*Defendant in Error.*

No. 486

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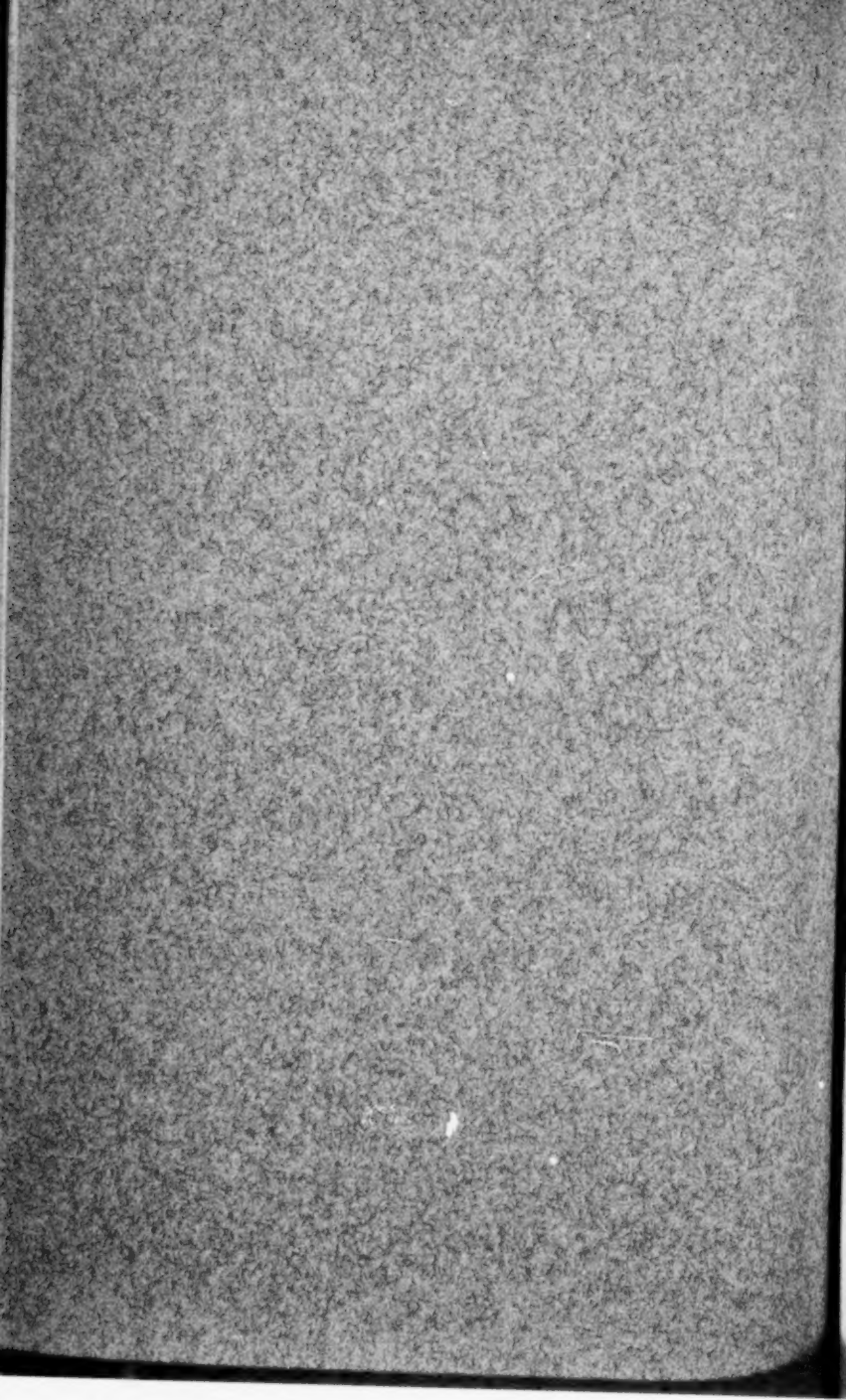
**BRIEF OF PLAINTIFF IN ERROR.**

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In the Supreme Court of the  
United States  
October Term, 1915

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The Chicago, Rock Island and  
Pacific Railway Company,  
*Plaintiff in Error,*

vs.

A. P. Bond, Administrator of the  
estate of William L. Turner,  
Deceased,  
*Defendant in Error.*

No. 486

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**BRIEF OF PLAINTIFF IN ERROR.**

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**STATEMENT OF CASE.**

On January 4, 1913, the defendant in error, hereinafter designated as plaintiff, commenced this action in the District Court of Garfield County, Oklahoma, against the plaintiff in error, hereinafter designated defendant, wherein he sought to recover thirty-five thousand (\$35,000.00) dollars



damages for the death of William L. Turner, alleged to have been occasioned by the negligence of the defendant on July 28, 1912, in the defendant's yards at Enid, Oklahoma.

On June 24, 1913, the defendant filed its petition for removal to the United States District Court for the Western District of the State of Oklahoma, and the cause was removed thereto. Subsequently, on September 18, 1913, the cause was by the said United States District Court remanded to the District Court of Garfield County, Oklahoma. On October 24, 1913, the plaintiff filed his amended petition (R. 22-28):

#### **The Amended Petition.**

In it he alleged the fact of the death of William L. Turner on July 28, 1912, and that Ida M. Turner, his widow, forty years of age, Enid, Oklahoma; Nellie Munger, 22 years of age, Creston, Iowa; Anna Foley, 20 years of age, Enid Oklahoma; together with the following minors, who lived with the said Ida M. Turner, namely:

Vera Turner, 15 years of age.  
Mary Turner, 10 years of age.  
Dorothea Turner, 8 years of age.  
William L. Turner, 6 years of age.  
Bessie Turner, 4 years of age.  
Austin L. Turner, one year of age.

were his sole beneficiaries. He alleged his appointment on June 4, 1913, in the County Court of Garfield County, Oklahoma, as administrator of the estate of William L. Turner and his qualification and his entry upon his duties as such.

In paragraph three of the amended petition the interstate character of the defendant was alleged and the location of the various tracks and coal chutes in the said yard at Enid set out.

In paragraph four he alleged the city of Enid to be a municipal corporation of the first class, under the statutes of Oklahoma, with powers of regulation as such and that the maximum speed of trains within the city of Enid was fixed by the said corporation to be ten miles per hour.

In the fifth paragraph it was alleged the deceased William L. Turner was employed by the defendant under two labor contracts, one for unloading coal, sand, etc., and attached as Exhibit "A" to the petition and the other for coopering cars, marked Exhibit "B" and attached to the petition.

In the sixth paragraph that on July 28, 1912, about five o'clock p. m. there was no switching in the yards and that a strong wind was blowing from

the southwest which carried smoke of engines across the yards and objects therein were obscured by it.

In paragraph 7 that after taking the coal tickets the deceased went to the Enid Mill & Elevator, by which company he was employed to unload coal for their engines, and was at said elevator at the time the whistle was blown by the defendant's northbound passenger train No. 24.

In paragraph 8 that as the said passenger train No. 24 entered the yards engine 2113, from an interstate freight train from Caldwell, Kansas, then engaged in switching in the yards, backed northward parallel to the track upon which the said passenger train No. 24 was running northward and as the deceased William L. Turner was crossing the tracks in the defendant's yards in a westerly or northwesterly direction he was struck by a backing car attached to the said freight engine 2113, backing northward, and run over and killed.

In paragraph 9 that engine 2113 and the cars coupled thereto were "operated and used" in violation of Section 2 of the Safety Appliance Act (Approved March 2, 1903, 32 U. S. Stat. at L. 943), and in violation of a rule of the Interstate Com-

merce Commission made June 6, 1910, and that such violation was the proximate cause of the death of William L. Turner, deceased.

In paragraph 10 the specific acts of negligence are set forth and based upon the carelessness and incompetency of the servants in charge of the said engine 2113 and cars coupled thereto, which ran over and killed the said William L. Turner, deceased, while they were backing northward in the yards at Enid, Oklahoma, being then engaged in interstate commerce, the said specific allegations being lettered a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r and s (R. 26-27).

In paragraph 11 that William L. Turner, deceased, was 46 years of age at the time of his death and previously of good health, competent and experienced as a workman, and that his earnings were \$1500.00 per year at the date of his death.

Exhibit "A" attached to the amended petition was a contract entered into Nov. 1, 1910, between the defendant and the deceased William L. Turner, in force on July 28, 1913. It provided for the unloading of coal from cars consigned to the defendant and the placing of the said coal in the coal chute pockets at Enid, Oklahoma, by the de-

ceased and for the unloading of wood and sand and the loading of cinders at points designated, on the right of way. The contract provided the rate of payment therefor. It stipulated that the deceased would maintain a sufficient supply of coal in the chute for the use of the railway company's engines; that he would indemnify the railroad for any injury to himself or to any of his employes while engaged in the performance of this work under his contract; that he would be punctual in his duties thereunder; that the contract should continue until terminated, either party having the option to so terminate it by giving fifteen days' notice of said desire; that the failure to perform the contract by the deceased would automatically terminate it at the option of the railway company; that the railway company would furnish the tools for use in unloading the coal; that the parties agreed and understood that William L. Turner was to be regarded as an original contractor, free from any control by the railway company except as to results of the work covered by the contract; that the railway company should keep a record of the cars unloaded by the deceased at the coal chutes; that payment should be made monthly and that the contract might inure in favor of the successors

and administrators, but that the same could not be sublet by the deceased without the written consent of the railway company.

Exhibit "B" provided for the cooperage of cars by the deceased William L. Turner, fitting the cars for carrying grain, providing the manner of coopering and the method of payment for the said labor.

A motion by the defendant to strike from the amended petition certain parts thereof was overruled by the court Nov. 5, 1913, on which day the defendant filed a demurrer, based upon the grounds that the plaintiff was without legal capacity to sue; that there was a defect of parties plaintiff; that several causes of action were improperly joined and that the said amended petition did not state facts sufficient to constitute a cause of action.

This was overruled and on Nov. 14, 1913, the defendant filed its answer to the amended petition heretofore summarized, setting up in the first paragraph thereof the admission of its corporate character and a general denial of all other allegations.

**Answer.**

The second paragraph of the answer averred that the deceased William L. Turner received his

injuries by reason of his own negligence and want of care and the third paragraph of the answer alleged specifically the contributory negligence of the deceased in walking between the tracks on July 28, 1912, in the defendant's yard at Enid, Oklahoma, without the exercise of ordinary care for his safety and in stepping upon track No. 2 upon which engine No. 2113 and the cars coupled thereto were backing, and while crossing which track the said William L. Turner, deceased, was struck and injured, from which injuries he subsequently died. On Nov. 15, 1913, the plaintiff filed a reply, consisting of a general denial.

On November 28, 1913, the trial of the cause was begun. On December 3, 1913, the jury returned a unanimous verdict in favor of the administrator for \$7583.00, apportioning the amounts as follows:

Mrs. Ida Turner .....	\$3083.00
Vera Turner .....	400.00
Mary Turner .....	550.00
Dorothea Turner .....	650.00
William Turner .....	800.00
Bessie Turner .....	900.00
Austin Turner .....	1200.00
Nellie Turner .....	Nothing
Annie Turner .....	Nothing

On December 5, 1913, the defendant filed a statutory motion for new trial, setting out the er-

rors complained of. Judgment was entered on the verdict and in accordance therewith on December 15, 1913. On December 22, 1913, motion for new trial was overruled by the court. On January 16, 1914, petition in error and case-made were filed in the Supreme Court of the State of Oklahoma. On April 13, 1915, the Supreme Court of the State of Oklahoma, in an opinion by Mr. Justice Turner, affirmed the judgment of the trial court. No petition for rehearing was filed in the said cause and the judgment of the Supreme Court of the State of Oklahoma, affirming the judgment of the trial court in favor of the plaintiff became final.

**Questions Involved in the Controversy.**

I. Was William L. Turner, deceased, on July 28, 1912, the time of his injury and death, an independent contractor under the contract in force on said date, set forth as Exhibit "A" to the amended petition, or was he an employe of the defendant, The Chicago, Rock Island and Pacific Railway Company?

II. If William L. Turner, deceased, was an employe of the defendant, was he, on July 28, 1912, engaged as such in interstate commerce within the meaning of the Federal Employers' Liability Act and the amendments thereto (35 U. S. Stat. at L.



65, 36 U. S. Stat. at L. 291), under which act, as amended, this action was brought?

III. If William L. Turner, deceased, was an employe of the defendant on July 28, 1912, and engaged in interstate commerce at the time of his death, is the evidence disclosed by this record sufficient to sustain the allegations of defendant's negligence and the verdict of the jury based thereon?

IV. If William L. Turner, deceased, was, on July 28, 1912, an employe of the defendant, engaged in interstate commerce, and the defendant was guilty of negligence proximately causing his injuries and death, were the proceedings at the trial of the said cause, as approved by the Supreme Court of the State of Oklahoma, prejudicially erroneous as to this defendant with reference to:

(a) Instructions given by the court with reference to the plea of contributory negligence (instructions Numbers 10 and 18, R. 217, 219); with reference to the construction and administration of the Federal Employers' Liability Act and amendments thereto (35 U. S. Stat. at L. 65, 36 U. S. Stat. at L. 291) (instructions numbers 10 and 18, R. 217, 219),

and the Safety Appliance Act and amendments thereto (27 U. S. Stat. at L. 531, 29 U. S. Stat. at L. 85, 32 U. S. Stat. at L. 943) (instructions numbers 16, 17 and 18, R. 219); with reference to the definition of negligence (instruction number 11, R. 217); with reference to giving to the jury and subsequently withdrawing therefrom an instruction covering the movement of engine 2113 and the use of the power brakes (instruction number 39, R. 227).

(b) In admitting the incompetent evidence in connection with the actions of William L. Turner, deceased, and his relation to the defendant (R. 58, 104) and in permitting the jury to consider matters and things not in evidence under instructions given in connection therewith (instructions numbers 22, 23 and 24, R. 221), which action of the trial court was approved by the Supreme Court of Oklahoma in the opinion of Mr. Justice Turner by specific reference.

I.

Was William L. Turner, deceased, on July 28, 1912, an independent contractor under the contract set forth as Exhibit "A" to the amended petition in force on said date at the time of his injury and death or was he an employe of the defendant, The Chicago, Rock Island and Pacific Railway Company?

The contract attached to the amended petition

as Exhibit "A" between William L. Turner, deceased, and The Chicago, Rock Island and Pacific Railway Company was entered into November 1, 1910, duly executed by both parties. It provided that Turner should furnish all labor necessary to handle all coal to be unloaded from cars to the coal chutes of the defendant at Enid, required for the use of the engines coaling at that point, besides referring to labor in connection with wood, cinders and sand, and providing rates of pay for the service rendered, based upon a record kept by the railway company of the cars handled, payments to be made monthly, imposing upon William L. Turner, deceased, the duty of maintaining a sufficient supply of coal and of being punctual in the discharge of the obligations of the contract, the railway company agreeing to furnish necessary tools needed for the work and that Turner's failure to fulfill the obligations of the contract might, in the option of the railway company, cause a cancellation of the same, and providing, by express language in a separate paragraph, that Turner was to be considered as an original contractor by both parties, giving to each the right to terminate the contract by fifteen days' notice to the other and providing for the contract to inure to the benefit of the successors and as-

signs or administrators and executors of the parties thereto, respectfully, subletting of the duties imposed by the contract not to be made without written consent.

The parties to the contract provided that the relation under it, should be that of an independent contractor and not that of servant. If the obligations assumed and the privileges granted come within the field which this court has held to be properly that of the independent contractor, the contention of the defendant should be upheld.

In the case of *New Orleans, M. & C. R. Co. v. Hamming* (1873), 15 Wall. 649, 27 L. Ed. 221, this court, in an opinion by Mr. Justice Hunt, held the relation of master and servant existed because, under the purported contract, the railway company reserved the general management and control of the work and required all the details to be completed under its orders and according to its direction. It was there said:

p. 223. "The contractor undertakes in general terms to do the work well. The company reserves the power not only to direct what shall be done but how it shall be done. This is an important test of liability. *Kelly v. Mayor*, 11 N. Y. 432."

The conclusion of the court was that the rail-

way company was a master because of its reservation of the power to direct what should be done and how it should be done.

In *Singer Mfg. Co. v. Rahn* (1889), 132 U. S. 518, 33 L. Ed. 440, the court, in an opinion by Mr. Justice Gray, approving the case of *New Orleans M. & C. R. Co. v. Hanning*, stated the relation of master and servant to exist under the following conditions:

p. 442. 'And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co. v. Hanning*, 82 U. S. 15 Wall. 649, 656 (21: 220, 223).

In *Casement & Co. v. Brown* (1893), 148 U. S. 615, 37 L. Ed. 582, Mr. Justice Brewer, speaking for the court, held that the agreement "to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the engineers of the companies for whom the piers were to be built" did not establish the relation of master and servant. He said:

p. 585. "With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifica-

tions were prepared and settled by the railroad companies; the size, form and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size at the places fixed. They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with his contract—'only this and nothing more.' They were to see that the thing pro-

duced and the result obtained were such as the contract provided for. *Carman v. Steubenville & L. R. Co.*, 4 Ohio St. 399, 414; *Corgin v. American Mills*, 27 Conn. 274; *Wood, Mast. & S.*, p. 610, Sec. 314."

In *Weinman v. de Palma* (1914), 232 U. S. 571, the court, speaking by Mr. Justice Pitney, held Grande, who had an agreement with Barnett, a plaintiff in error, not to be an independent contractor, because he was required to follow the instructions of another agent. It was said:

p. 576. "But the evidence showed that he was required to follow the instructions of La Driere, who was Barnett's agent, and that La Driere was in fact in charge of the work. For this reason it was properly held that Grande was not an independent contractor."

In the case of *Arthur v. Texas & P. Ry. Co.* (C. C. A. 8th C. 1905), 139 Fed. 127, District Judge Phillips, speaking for the Circuit Court of Appeals for the Eighth Circuit, held that a compress company was a separate independent contractor and not a servant of the railway company, following the cases of *New Orleans, M. & C. R. Co. v. Hanning* and *Singer Mfg. Co. v. Rahn*, above referred to, and quotes a statement from the Supreme Court of Missouri with approval as follows:

pp. 131-132. "Bliss, J., in *Hilsdorf v. City*

of *St. Louis et al.*, 45 Mo. 94, 98, 100 Am. Dec. 352, said:

“ ‘The rule that prescribes the responsibility of principals, whether private persons or corporations, for acts of others, is based upon their power to control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not the master, for the relation implied by that term is one of power—of command; and if the principal can not control his agent he is not an agent, but holds some other or additional relation. In neither case can the maxim *respondeat superior* apply to them, for there is no superior to respond.’ ”

In *Fuller v. Citizens National Bank* (C. C. Ohio, 1882), 15 Fed. 875, the court charged the jury that the furnishing of materials with which the vault was to be constructed by one claiming to be an independent contractor did not change the relation, if the whole work of excavation had been let without reserving control of the construction.

In *Cox v. Philadelphia* (C. C. Pa. 1908), 165 Fed. 559, the court held that the city had an inspector at the place of work who pointed out to the construction company, at various times, what the inspector thought to be dangerous places, did not change the relation of independent contractor between the construction company and the city. The inspector had no “power to direct em-



ployes of the construction company nor to interfere with their method of operation.”

In *Reidel v. Moran, etc., Co.* (Mich. 1894), 61 N. W. 509, the defendant company had hired a cartage company to handle some outgoing freight. They pointed out the goods and indicated their destination. They exercised no other control over the employes of the cartage company. The court held that this did not destroy the relation of independent contractor.

In *Kuehn v. City of Milwaukee* (Wis. 1896), 65 N. W. 1030, the court held that a contract between the city and the individual regulating the place of deposit of garbage without reserving the right to control the manner of the performance of the contract did not destroy the independent contract relation.

In *Vosbeck v. Kellogg et al.* (Minn. 1899), 80 N. W. 957, the court sustained a contract, creating the relation of the independent contractor which was involved in an action for personal injuries to a child injured by having its hands caught in a pulley through which a rope was being drawn while the construction work was in process. The court held that under the facts the telephone com-

pany had no authority to prescribe the details of the work and was thereunder not liable because of the independent contract existing.

In *Louisville & N. R. Co. v. Smith's Admr.* (Ky. App. 1909), 119 S. W. 241, the court held that the deceased was an independent contractor where he had contracted to do certain masonry work and at the time of his death was engaged in excavating for said work. The railway company, at that time, had erected false work to support the track during the construction of the culvert and kept a man at the bridge who saw that the track was safe for passing trains, but had no control over the contractor's method or the work except to see that the work met with specifications.

The relation of independent contractor is indirectly involved in the following cases, in which the action was brought by an employe of the independent contractor against the other party to the contract:

*Salliotte v. King Bridge Co.* (C. C. A. 6th C. 1903), 122 Fed. 378.

*Morning v. Cramp & Co.* (C. C. A. Pa. 1909) 170 Fed. 364.

*United Gas Imp. Co. v. Larsen* (C. C. A. 3rd C. 1910), 192 Fed. 620.

*Boardman v. Creighton et al.* (Maine 1901), 49 Atl. 663.

*Pioneer F. Const. Co. v. Hansen* (Ill. 1898), 52 N. E. 17.

*Sullivan v. New Bedford G. & E. L. Co.* (Mass. 1906), 76 N. E. 1048.

*Porter v. Tenn. C. I. & R. Co.* (Ala. 1912), 59 Sou. 255.

*Texas Traction Co. et al. v. George et al.* (Tex. Civ. App. 1912), 149 S. W. 438.

The Oklahoma Supreme Court has discussed the question of independent contractor in the case of *Chicago, R. I. & P. Ry. Co. v. Bennett* (1912), 36 Okl. 358, 128 Pac. 705, and the case of *Derr Const. Co. v. Gelruth* (1911), 29 Okl. 538, 120 Pac. 253.

In the cases of *Branstrator v. Keokuk & W. R. Co.* (Iowa, 1899), 79 N. W. 130, and *Atchison, T. & S. F. Ry. Co. v. Dickens* (Ind. Ter. App. 1907), 103 S. W. 750, the court construed two contracts very similar to the one now before the court for interpretation. In *Branstrator v. Keokuk & W. R. Co.*, the action was brought by an employe of one Anderson, an alleged independent contractor, who had the agreement with the railway company. Anderson had agreed to load cars at the particular side track, at a specified price per car. The action was based upon the negligence of the railway company in failing to furnish

this employe of Anderson a reasonably safe place to work and upon a promise made to him that if necessary the railway company would pour water upon and collect the slack. A large chunk of the hot slack fell and burned the plaintiff on the arm. A demurrer was sustained to the petition by the trial court. The action was sustained by the Supreme Court of Iowa.

In the case of *Atchison T. & S. F. Ry. Co. v. Dickens*, Henry Dickens was an engine cleaner at Purcell, Oklahoma. While engaged in cleaning an engine at the cinder pit a coal heaver, Cooper, undertook to move an engine left standing at the coal chute. The engine got beyond his control, struck the engine deceased was working on and caused his death. The coal heaver, Cooper, was an employe of one Closson, who had a contract for the handling of all coal to be unloaded from cars for the use of engines. The plaintiff alleged a failure on the part of the railway company to furnish a reasonably safe place for the work and that it carelessly left the engine under steam so that the same might fall into the hands of an incompetent person. The court held that the contract created the relation of an independent contractor between the railway company and Closson

and that the railway company was not liable for the acts of the coal heaver as Closson's servant and reversed a judgment in favor of the plaintiff.

The cases upon the subject "Who is an Independent Contractor" are collected in very full notes found in 65 Lawyers' Reports, Annotated, 445, 508; 19 American and English, Annotated Cases 3, and 27 American and English Annotated cases 573. We believe there is no confusion as to what constitutes an independent contractor. Decisions of this court state the rule by which this relation is determined clearly.

Where the contract purporting to create the relation of independent contractor is a written one, whether or not the party is an independent contractor is a question of law for the court. The Oklahoma Supreme Court in the case of *The Chicago, R. I. & P. Ry. Co. v. Bennett* (1912), 36 Okl. 358, 128 Pac. 705, said:

p. 364. "We think it can be correctly said that, where the contract of employment is in writing, the question of the relation created by it between the parties is ordinarily one of law for the court; but if the contract is oral, and the evidence is conflicting, or where a written contract has been modified by the practice under it, the question should be submitted to the jury under proper instructions. 1

Thompson on Neg. 640; Moll, Ind. Contr., Secs. 28, 29, and authorities cited."

This position is supported by the cases of:

*Atchison, T. & S. F. Ry. Co. v. Dickens*  
(Ind. Ter. App. 1907), 103 S. W. 750.

*Foster v. City of Chicago* (Ill. 1902),  
64 N. E. 322.

*Good et al. v. Johnson* (Colo. 1907), 88  
Pac. 439, 8 L. R. A. 896.

*Larsen v. Home Telephone Co.* (Mich.  
1911), 129 N. W. 894.

*Perkins v. Blouth et al.* (Cal. Sup. 1912),  
127 Pac. 50.

The contract at the time of William L. Turner's death had not been modified by the practice of the parties thereto and there is no question as to the subject matter of it being unlawful or a nuisance being created by the terms of it. The actions of the parties and their business dealings with one another are disclosed by the testimony of the defendant's agent, J. A. Bowman, and his chief clerk, F. H. Wallace, which we shall quote for the convenience of the court. Agent J. A. Bowman testified:

"Q. Immediately prior to his death, do you know of any contracts he had with the Rock Island Railroad Company for work at Enid?

A. Yes, sir.

Q. In a general way, what were they?

A. We had a contract for him to take care of the coal chute and for the cooperage of our cars.

Q. Did he do any work aside from that in transferring freight?

A. Yes, sir, but not under contract.

296 Q. How was he employed to do that work?

A. He was employed the same as we would employ any other extra labor. We are allowed at Enid an extra laborer and whenever work shows up to require it we have authority to employ an extra man to take care of that work and we would call Mr. Turner to do it when he had time.

Q. In what way did you pay him?

A. At times he was paid by voucher and at times he was carried on the labor roll.

Q. At the time, July 28th, 1912, was he or not employed in this extra way that you speak of?

A. He was not.

Q. At the time of his death, did he have any duties to perform except those covered by the two written contracts to which you refer (R. 165)?

A. He did not" (R. 166).

\* \* \* \* \*

"Q. I will ask you when you came to Enid?

By THE WITNESS: On February 1st, 1912.

299 Q. Was Mr. Turner here in the service of the road at that time?

A. Mr. Turner was employed under contract at that time.

Q. He was performing services under that contract?

A. Yes, sir."

\* \* \* \* \*

"Q. Was he working under your orders and directions here?

BY THE WITNESS: He was as far as his contracts were concerned" (R. 167).

\* \* \* \* \*

"Q. From whom did Mr. Turner get instructions about handling work performed by him?

A. Under his contract, from me.

Q. You directed him what to do?

A. Yes, either me or my chief clerk.

301 Q. So that he was under your supervision and control all the time?

A. Insofar as the contracts were concerned, yes, sir" (R. 168).

FRANK H. WALLACE testified as follows:

"Q. Was it his duty to make his report of coal unloaded to your office?

A. Nothing more than to give me the car numbers of the cars that he unloaded.

Q. That was his report?



A. That is the only report that I know that he made.

Q. That is, for unloading coal into the chutes?

A. Yes, sir.

Q. You already had the number of the car as it was set up on the chutes?

A. He reported the cars to me when they were placed on the chutes" (R. 87).

\* \* \* \* \*

"Q. You have testified in regard to these coal tickets that Mr. Turner usually turned in at the freight depot; do you know whether or not he had turned in his coal tickets on this day prior to the time he was killed?

A. No, sir, he had not.

Q. How do you know that?

A. Because I remember going for the tickets after it happened, myself.

Q. Where did you go after those tickets?

A. I went to the coal chutes.

Q. What time of day did you go to the coal chutes, do you know?

A. I could not say as to the hour.

Q. But some time that afternoon?

A. Yes, sir, some time after this happened.

165 Q. Did you get the coal tickets there?

A. I got some coal tickets, yes, sir" (R. 90).

W. M. HUTCHINSON, who was fireman at the

White Mill (Enid Mill and Elevator Company) at the time of Turner's death, testified:

“Q. Did you see him on the 28th day of July, 1912, the date of his death?

A. Yes, sir.

Q. About how long before he died?

A. About ten minutes.

Q. What were you doing at that time?

A. I was firing at the white mill at that time.

Q. At what particular place were you when you saw him first?

A. I was on the cinder pile when I was talking with him.

Q. At about what hour of the day?

A. It was about 5:25 o'clock.

Q. In the morning or evening?

A. In the evening.

Q. What were you doing on the cinder pile?

A. I was hauling cinders from the boiler room.

Q. Where was he?

A. He was coming from the ice plant when I first discovered him.

109 Q. From which part of the ice plant?

A. When I saw him he was about twenty feet south of the door coming towards me.

Q. Called the cream room?

A. Yes, sir.

Q. What did he say to you when he came up, if anything?" (R. 57.)

\* \* \* \* \*

"Q. What did he do while you were conversing there, while you were on top of the cinder pile?

By THE WITNESS: He walked up and spoke to me. He lit his pipe and about (R. 57) that time he heard a train whistle and he pulled out his watch and says—

By W. H. MOORE: Never mind what he said.

By THE COURT: Just state what he did, not what he said.

By THE WITNESS: Well, he lit his pipe and turned around and walked away.

By THE COURT: When he pulled his watch out what did he do?

A. He said—

Q. What did he do; did he look at it?

A. Yes, sir.

Q. Then what did he do?

A. He put his watch in his pocket.

Q. Then what did he do?

A. He turned around and walked away west.

By JNO. C. MOORE: In what direction?

By THE WITNESS: Between the boiler room and the elevator.

Q. I will ask you if that would be in the direction of the freight house?

A. Yes, sir.

Q. I will ask you this: I will ask you if when he pulled out his watch when 24 whistled in, when he pulled out his watch and looked at it, if he said to you: 'There is 24; I must go and turn in my coal tickets and order coal for the chutes'?

A. Yes, sir.

111 By W. H. MOORE: We wish to object to that and ask the court to instruct counsel not to ask questions of that kind after they have been ruled out by the court; it is highly improper and prejudicial.

By THE COURT: Yes, the answer will be stricken out and the jury is instructed not to consider it" (R. 58).

\* \* \* \* \*  
"Q. Now, Mr. Hutchinson, which way did he go?

By THE WITNESS: He started towards the freight depot" (R. 59).

\* \* \* \* \*  
"Q. State when you and Mr. Turner heard train 24 whistle for the station, what did Mr. Turner do, if anything?

By THE WITNESS: He pulled out his watch and said: 'There is 24; I will have to take my tickets to the freight depot and go and order coal for the chutes '

Q. Which way did he go then?

A. He turned around and walked back west towards the freight depot" (R. 104).

CHARLES JACKSON, an ice cream maker for the Enid Ice and Fuel Company, testified to talking with Turner just before his death as follows:

“Q. What was your business at that time?

A. Assistant ice cream maker for the Enid Ice and Fuel Company.

Q. Were you acquainted with W. L. Turner?

A. I was.

Q. Do you remember the occasion of his being killed in the yard at Enid?

A. Yes, sir.

Q. Had you seen Mr. Turner that day?

A. I had.

Q. When and where?

A. In the plant of the Enid Ice and Fuel Company.

Q. What time of day was it?

A. Approximately about five o'clock in the afternoon.

Q. Did you have any conversation with him on that day in regard to loading coal?

A. I did.

228 Q. What was the substance of that conversation?

A. He was loading a car of coal for the Enid Mill and Elevator and it was along in the evening he came through the plant and wanted to employ my brother and me to help him finish it up.

Q. Where was that car he was loading for the Enid Mill and Elevator Company?

A. About half way between the plant and the Texas Oil Company.

Q. How long was Mr. Turner about the plant at the time you had this conversation?

A. I think about a half hour.

Q. How long after he left there did you hear of his death?

A. Well, about ten or fifteen minutes" (R. 161).

GEORGE W. BOND, a witness for the plaintiff, who worked for Turner, deceased, in handling coal at Enid, testified as follows:

"Q. Did you know anything about his unloading coal for the Enid Ice and Fuel Company, the Enid Mill and Elevator Company and Grubb and Purmort?

A. Yes, sir.

Q. I will ask you about that—at what hours in the day did he generally unload coal for those institutions?

A. He would generally unload for the mill at night and the other places when he got time; he always kept hands there and kept plenty of coal for the chutes" (R. 74).

\* \* \* \* \*

"Q. Your work was being done for Mr. Turner?

BY THE WITNESS: Yes, sir.

Q. You were not on the Rock Island pay roll?

A. I worked for Mr. Turner.

Q. And Mr. Turner had a contract with some elevators for handling coal for them?

A. I suppose he did, or he would not have handled it.

Q. You know it by seeing him do it?

A. Yes, sir.

Q. What companies did he handle coal for besides the railroad?

A. The white mill, the ice plant and Grubb and Purmort and some for this Arctic ice plant.

Q. How many men did Mr. Turner have working for him?

A. Sometimes three or four and sometimes more.

Q. (139) If the work bunched up on him he would get more men?

A. Yes, sir.

Q. And if the work was slight he would lay the men off?

A. Yes, sir, that is the way he had to do it" (R. 75).

"Q. I will ask you, Mr. Bond, if on the evening that Mr. Turner was killed, after his being killed, if you looked into the coal ticket boxes?

BY THE WITNESS GEO. W. BOND: Yes, sir.

Q. Did you see any tickets there?

A. Yes, sir; there were as many as two tickets in the north end box. I never looked into but one box" (R. 134).

The deposition of Hess Conway, an employe of Turner's, was read in evidence. He testified as follows:

"Q. Who were you working for on July 28th, 1912?

A. Mr. Turner.

Q. Who paid you for your work in unloading coal on the chutes at Enid?

A. Mr. Turner did up to that time.

Q. Under whose directions were you working on July 28th, 1912?

A. Mr. Turner's.

Q. How long had you been working for Mr. Turner prior to that time?

A. Ever since July 2nd.

Q. Of the same year?

A. Yes, sir" (R. 120).

\* \* \* \* \*

"Q. Can you tell the first time when any coal was set to the chutes after Mr. Turner's death?

A. Monday morning.

Q. At what time on Monday morning?

(Objected to by plaintiff as immaterial.)

By THE COURT (at trial): Overruled.

A. It was set before seven.



Q. I will ask you to state if it is not a fact that at the time Turner was killed there were cars containing coal on the chutes of the defendant at Enid?

A. No, sir'' (R. 121).

The testimony of the defendant's agent, Bowman, was to the effect that W. L. Turner, deceased, was employed occasionally as an extra laborer in transferring freight and at such times was put upon the pay rolls of the company (R. 165).

A number of courts have held that an individual may be an independent contractor as to certain work covered by the contract and a servant as to other work for the same party with whom he has an independent contract.

*Gaicomini v. Pacific Lumber Co.*, 5 Cal. App. 218, 89 Pac. 1059.

*Toomel v. Donovan*, 158 Mass. 232, 33 N. E. 396.

*Omaha Bridge etc. Co. v. Hargadine*, 98 N. W. 1071, 76 Neb. 729, 107 N. W. 864.

*Dublin v. Taylor etc. R. Co.*, 92 Tex. 535, 50 S. W. 120.

*Vickers v. Kanawha etc. R. Co.*, 64 W. Va. 474, 63 S. E. 367, 20 L. R. A. (N. S.) 793, 131 Am. St. Rep. 929.

We believe there can be nothing found in the above testimony which will, in any way, modify

the conclusion that the deceased was an independent contractor.

Section 9 of the contract previously referred to is as follows:

“Ninth. It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor and the Railway Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished” (R. 30, 31).

In view of the fact that this contract was in force at the time of the death of William L. Turner and purported to control his duties and privileges with The Chicago, Rock Island and Pacific Railway Company, we believe, under the rules announced in the foregoing cases, that the facts show that the trial court was in error in not holding the said William L. Turner, deceased, to be an independent contractor at the time of his death.

Instead of construing the written contract, the trial judge left the construction of the contract, so far as its purpose was concerned, to the jury and instructed them that if the contract had for its intent to enable the defendant to exempt itself from the provisions of the Federal Employers' Liability Act, it should not be considered, because

such contract was void. The instruction, being number 20, was as follows:

“20. You are instructed that if in any contract, rule, regulation or device whatsoever, it may have been made to appear to you that the purpose and intent of said contract, rule, regulation or device whatsoever shall be to enable the defendant company to exempt itself from any liability for such injury, that you shall not consider such contract, rule, regulation or device whatsoever as contained in any contract of employment, but shall consider such portion of such contract as being void and forbidden by law” (A. 220).

The contract, or rule, which the court evidently had in mind was that referred to in Section 5 of the Employers' Liability Act, which reads as follows:

“Sec. 5. That any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employe, or the person entitled thereto on account of the injury or death for which said action was brought.”

The later part of this section clearly shows that it has reference to insurance, relief benefit or indemnity contracts and not to contracts with parties under which they sought to become independent contractors. That this section is limited to this field is shown by this court's construction of this section in the case of *Philadelphia, B. & W. R. C. v. Schubert* (1912), 224 U. S. 603, 56 L. Ed. 911.

We insist that this instruction, in view of the record, clearly prejudiced the defendant's rights. We believe the court was not only in error in failing to hold, as a matter of law, upon the contract attached to the amended petition, marked Exhibit "A," and the evidence with reference to the actions of the parties thereto, under the same, that the deceased William L. Turner was an independent contractor under the rule laid down by this court in the cases previously cited, but also committed error in giving instruction number 20 above quoted with reference to the intent and purpose of the contract, having reference to Section 5 of the Federal Employers' Liability Act

## II.

**If William L. Turner, deceased, was an employe of the defendant, was he, on July 28, 1912, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and the amendments thereto (35 U. S. Stat. at L. 65, 36 U. S. Stat. at L. 291), under which act, as amended, this action was brought?**

William L. Turner, deceased, was killed July 28, 1912. The Federal Employers' Liability Act of 1908 (35 U. S. Stat. at L. 65), which was in force at that time, provides "that every common carrier by railroad, while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe."

Construing this provision of the act, the court, in the case of *Illinois C. R. Co. v. Behrens, Admr.* (1913), 233 U. S. 473, 58 L. Ed. 1051, in the opinion written by Mr. Justice Van Devanter, said:

p. 1055. "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which

the employe is engaged is a part of interstate commerce. The act was so construed in *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779."

Just prior to the accident resulting in Turner's death, Turner had gone from the ice plant to the "white mill" (Enid Mill and Elevator Company's plant) and had been conversing with witness W. M. Hutchinson, who was at work on the cinder pile. He left this place about the time train No. 24 whistled and was meandering through the freight yards when struck by the cars attached to the backing engine. He was going in a northwesterly direction, the coal chutes being some 1400 feet to the southwest of where his body was found after the accident. The evidence, which has been set forth at length in the pages of this brief just preceding and which is found in the record at pages 57, 58, 59, 74, 87, 90, 104, 120, 121, 134, 161, 165, 166, 167 and 168, disclosed the facts above stated. He had been working for the Enid Ice and Fuel Company (R. 160-161), for the white mill (Enid Mill and Elevator Company) (R. 160), and had had a conversation about 5 p. m. with an employe of the Enid Ice and Fuel Company in which he tried to get him to assist in unloading a car of

coal for the Enid Mill and Elevator Company, which car was located just north of the Texas Oil Company's plant on the right-of-way. He then had a conversation with the employe of the Enid Mill and Elevator Company about 5:25 p. m. after coming from the ice plant and, when he left him, started in the direction of the freight depot (R. 59).

His presence at the Enid Ice and Fuel Company's plant and at the Enid Mill and Elevator Company's plant, on the east side of the tracks, was clearly then in connection with his business of unloading cars of coal for these two plants. It had no relation to the work which he was doing for The Chicago, Rock Island and Pacific Railway Company. There is no evidence in the record that he had any of the coal tickets in his pocket or in his possession which it was his custom to deliver to the freight house at the close of each day's work, some time between 4 and 6 p. m. It was shown that Chief Clerk Wallace went to the coal chutes and got some of the tickets (R. 90) and one of Turner's employes, George W. Bond, found some tickets in one of the boxes where they were customarily kept, into which he looked (R. 134).

The record is silent as to whether or not these are all the tickets covering the handling of coal on that day and as to what became of the others if they were not all either in the box or delivered to the freight depot after Turner's death.

Some evidence was introduced, to the competency of which the defendant objected, with reference to Turner's intention to go and turn in the coal tickets. This conversation was had with the witness Hutchinson at the Enid Mill and Elevator plant about ten or fifteen minutes prior to Turner's death. The testimony does not disclose that Turner had the tickets at the time he had the conversation and, as none were found upon his person by the undertaker or by any person near his body after the accident, it is only fair to presume that he did not have them. We believe this to be the only conclusion to be drawn from the record, even considering the alleged incompetent evidence.

He was walking north in the yards of the railway company at Enid, between track number 2 and track number 3 when engine 2113, with the box car and the flat car, was backing northward on track number 2. He turned to the westward and was either crossing the track diagonally, in a



northwesterly direction, or walking northward between the rails of track number 2 when he was struck by the coupler of the car.

There is nothing in the record to show that he was doing anything for The Chicago, Rock Island and Pacific Railway Company at the time of the accident. It can not fairly be said that his private business with the witness Jackson and others whom he had seen in regard to assisting him in the unloading of a car of coal for the Enid Mill and Elevator Company had been terminated.

If the contention of the plaintiff is correct, that Turner was an employe of the defendant Railway Company, it must be limited by the other facts in evidence in the record. If the conclusion is properly drawn that Turner was employed by The Chicago, Rock Island and Pacific Railway Company, it must also be said that he had private business with the Enid Mill and Elevator Company, the Enid Ice and Fuel Company and Grubb and Purnmort at the same time at which he was so employed by the railway company. In addition to this, he was often carried on the pay roll of the railway company as an extra laborer, when he was paid as the other laborers at the Enid station were

for the service rendered, his work as such extra laborer being transferring freight from damaged cars enroute.

Whether or not Turner was, at the time of the accident, engaged in interstate commerce is a question of fact which this court must finally pass upon. In three cases by this court in which the acts of the plaintiff or the deceased have been construed to be inseparably connected with interstate commerce and forming a part thereof, the question of master and servant or independent contractor did not enter.

In the case of *Pederson v. Delaware, L. & W. Ry. Co.* (1913), 229 U. S. 146, 57 L. Ed. 1125, the deceased was a section laborer, regularly employed, and at the time of the accident was construed to be engaged in interstate commerce.

In the case of *St. Louis, S. F. & T. Ry. Co. v. Scale* (1913), 229 U. S. 156, 57 L. Ed. 1129, the deceased was a car clerk, regularly employed to check the cars in the ward, and was on his way to begin his work at the time of the accident.

In the case of *North C. Ry. Co. v. Zachery* (1914), 232 U. S. 248, 58 L. Ed. 591, the deceased was a regularly employed fireman who had been

called in line with his employment to take his engine out on its regular run and was about the station and within the scope of his employment when crossing the tracks at which place he was killed by a switch engine.

We think these cases, together with the case of *I. C. R. Co. v. Behrens*, above quoted from, clearly define the limits of what acts on the part of individuals are deemed to be acts inseparably connected with interstate commerce and forming a part thereof. Under these cases, it seems that the acts being performed by Turner, deceased, at the time of the accident did not constitute interstate commerce and are not acts which, if properly construed, would form a part of interstate commerce. If Turner, deceased, was not so engaged, the motion for a directed verdict on behalf of the railroad company should have been sustained. The cause of action alleged was based upon the Federal Employers' Liability Act, which is limited to employes of railway companies engaged in interstate commerce at the time the cause of action accrued. We believe the trial court and the Oklahoma Supreme Court, which affirmed its judgment, were in error in their holding with reference to the verdict of the jury and the judgment of the trial court being properly sustained by the facts of evidence.

### III.

**If William L. Turner, deceased, was an employe of the defendant on July 28, 1912, and engaged in interstate commerce at the time of his death, is the evidence disclosed by this record sufficient to sustain the allegations of defendant's negligence and the verdict of the jury based thereon?**

If Turner, deceased, was an employe at the time of the accident and this court should construe his acts at that time to be connected with interstate commerce and forming a part thereof, the facts in the record, in our judgment, are still insufficient to sustain the verdict based upon negligence.

In paragraph 10 of the plaintiff's amended petition, upon which the cause was tried (R. 26, 27), are found the particular allegations of negligence under the letters a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r and s. In the instructions of the court the jury were told that no recovery could be had upon sub-divisions a, b, c, d, e, f, g, h, j, k, l, m, p, q, r and s of paragraph 10. No recovery was permitted under sub-division "n" of paragraph 10 unless "the acts of the brakeman were not the acts of an ordinarily prudent man, considering the surrounding circumstances as they appear from the evidence." The instruction with reference to sub-division "o" of paragraph 10 was given to the jury, advising that no recovery could be based

upon the same. This was afterward withdrawn by the court, which action is complained of in another portion of this brief. The plaintiff is restricted by the Oklahoma Supreme Court to the specific acts of negligence alleged. These control over the general averment.

*The Chicago, R. I. & P. Ry. Co. v. McIntyre* (1911), 29 Okl. 797, 119 F. 1008.

The case was allowed to go to the jury upon specifications "i," "n" and "o" and upon paragraph "n" only in a modified degree. These paragraphs allege specific negligence as follows:

"(i) When seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger" (R. 27).

"(n) By the brakeman in waiting to give signal to Turner until he was in imminent peril, and then, instead of giving a train signal which Turner well understood, he gave a (48) loud and piercing yell which caused Turner, who was unaware (R. 26) of any danger, to stop and turn and throw him in a position to be helpless with the rapidly running train" (R. 27).

"(o) The engineer was guilty of negligence in running his train at high rate of speed and in not using the train power brakes by which he

might have controlled its speed or have stopped it when signalled so to do. He was guilty of negligence in running his train in excess of the speed established by ordinance of the city" (R. 27).

Agent Bowman testified that Turner, deceased, had been at work in unloading the cars of coal, to his personal knowledge, since February 1, 1912 (R. 167). He had worked at railroad work for fifteen years (R. 74). His business with the industries located on the right-of-way and his experience in handling the cars on the industrial tracks, together with his work as extra laborer for the defendant and his long experience in railroad work would make him fully acquainted with the arrangement and handling of freight trains doing the usual switching in the yards and the methods of handling the passenger trains in arriving and departing from the station. If, then, he was an employe and was engaged in interstate commerce, what duty did the train crew in charge of engine 2113 and the box car and flat car coupled to it, owe Turner, deceased, as the engine and cars were backing northward in the yard?

The testimony is undisputed that the engineer, Wallace, was in his proper position on the west side of the engine, with his body a part of

the way out of the window and with his hand on the throttle, looking in the direction in which the engine and cars were backing, namely, northward (R. 170, 171); that one brakeman, Kendrick, was on the northwest corner of the rear or north car, this being the flat car, upon which a threshing machine or separator was loaded (R. 170, 182). The other brakeman, Portel, was near the middle of the north end of the flat car (R. 177, 182). The fireman, Reem, was ringing the bell and at his place on the opposite side of the engine from the engineer. The fireman testifies (R. 200) that he saw the deceased walking northward in the usual manner between tracks number 2 and number 3 and that there were freight cars on track number 3 parallel with the engine and two cars and the track on which they were running; that he did not see what became of Turner, but that he disappeared from his sight almost instantly and that he presumed that he had stepped between the cars on track number 3, which was to the eastward of the one upon which they were backing. A few seconds later he felt the application of the air and subsequently learned of Turner's death. The two brakemen on the rear of the rear car testified (R. 177, 180, 181, 182 and 184) to giving

warnings to Turner when they were from one-half a car to a car length away from him as he was walking between the rails of the track upon which they were backing. This testimony is supported by baggageman Crump (R. 195) and expressman Eppler (R. 197, 198), on train No. 24, which was running northward on the main track parallel with the track on which engine 2113 and the two cars were backing between them and the passenger station and the freight depot on the west.

The plaintiff introduced some evidence to prove the day windy and blustery. We presume the purpose was to show that Turner, deceased, was unable to see the engine and cars backing and to prove that the failure to find any of the coal tickets in his pockets or about his clothing after his death was because the wind had blown them away. Aside from the fact that some of the plaintiff's witnesses testified that the day was windy or blustery, there is no evidence to support this attempt. The fireman states that he could see Turner clearly. The two brakemen on the car which struck Turner make no mention of any interference with their vision. The engineer was able to see perfectly, from his position in the cab, to the north end of the car. The expressman and



the baggageman who were in the baggage and express car of the north bound passenger train, No. 24, saw clearly and mention no interference with the vision.

We think it cannot be said, from the evidence, that there was anything to obstruct Turner's vision and that the ringing of the bell on engine 2113 and the sounding of the whistle on train No. 24 as it approached Enid, as well as the noise of the moving cars that were being switched and those that composed the passenger train, would all warn him of the dangers surrounding him while he was walking in the yards.

The testimony with reference to the movement of engine 2113 and the cars attached thereto was to the effect that they were moving from eight to twenty-five miles per hour. The speed at which they moved was purely a matter of opinion. In part it was based upon the distance which the engine was found from Turner's body. This was apparently regardless of the fact that the engine had stopped, after running over Turner, only a few feet from him and then had moved on northward some distance away where it awaited the arrival of the coroner. There is no testimony, even under these

circumstances, that the movement of the engine and cars was an unusual movement or that it was more rapid than the movement which was customary and usual in the yards. Brakeman Kendrick testified that after the engine and cars came in on track No. 2, he caught the car upon which he was sitting at the time of the accident and that the engine and cars increased speed up to about ten miles per hour subsequently thereto. We do not believe that, in the circumstances here, the train was being handled in any other than the usual and customary manner in which switching was done at this point.

The duty which the railroad company owes to the employes working in and about its yards where switching is constantly done and trains are passing was stated by Mr. Justice Brewer in the case of *Aerkfetz v. Humphreys et al., Receivers* (1892), 145 U. S. 421, 36 L. Ed. 758, in the following language:

p. 759. "Upon these facts we observe that the plaintiff was an employe and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were

moved at slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction and, by ordinary attention, he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forward and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with

the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars and enabled him to step to one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had, all the time, knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants; and, if by any means negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury."

The statement of the court, quoted above, was approved in the cases of:

*Elliott v. Chicago etc. Ry. Co.* (1893),  
150 U. S. 245, 37 L. Ed. 1068.

*Patton v. Texas & P. Ry. Co.* (1901),  
179 U. S. 658, 45 L. Ed. 361.

The case has been followed in a long line of cases by the Circuit Courts of Appeals and Circuit and District Courts of the United States upon the point covered in the above quotation.

When Fireman Reem saw Turner, deceased, walking between the tracks there was nothing to

call his attention to the fact if, indeed, it was in Turners' mind, that Turner was going to attempt to cross track No. 2 upon which they were backing. When he did attempt to cross and stepped between the rails of track No. 2, both brakemen immediately began to warn him, calling as many as six or eight times before he was struck. When they first began to call him they testified that he was from one-half to one car length, or from twenty to forty feet, from the moving car. Another witness testified that he was approximately sixty feet from the north end of the fourth car when seen by this witness. The baggageman and expressman on train No. 24 as it passed the car upon which the two brakemen were riding, heard them hollowing and warning someone. They presumed it was the man whom they saw between the rails on the track on which the car upon which they were seated was moving. Turner, just prior to the time the coupler struck him, apparently heeded the warnings and turned with his head, noticing the car, too late to have avoided being struck by the car. There was no testimony to the effect that, after the signals were given, that anything else could have been done to avoid striking Turner than that which was done. Warnings were given by the persons who saw him

in a position of danger. Signals were given to stop the engine and cars as soon as he was discovered in the position of danger by them and the emergency application of the air upon the engine and the two cars which were properly coupled with it was made.

There can be no serious contention made, it seems to us, but that if Turner, deceased, had heeded the warnings of the brakemen when they first gave them, he could have placed himself in a position of safety and have avoided the accident. There can be no serious contention, we think, but that if Turner, deceased, had heeded the warnings which were being continued after the preliminary warning and the signal to stop had been given the engineer, the subsequent warnings being heard by the express messenger and the baggageman in the incoming passenger train on the main track as they passed the brakeman and Turner, but that Turner could then have placed himself in a position of safety and have avoided the accident.

Under this evidence, we believe it can not be said that there was any breach of duty on the part of the members of the train crew in charge of engine 2113 and the two cars coupled with it

toward William L. Turner, deceased, which proximately caused his death.

#### IV.

**If William L. Turner, deceased, was, on July 28, 1912, an employe of the defendant, engaged in interstate commerce, and the defendant was guilty of negligence proximately causing his injuries and death, were the proceedings at the trial of the said cause, as approved by the Supreme Court of the State of Oklahoma, prejudicially erroneous as to this defendant with reference to:**

(a) Instructions given by the court with reference to the plea of contributory negligence (instructions numbers 10 and 18, R. 217, 219); with reference to the construction and administration of the Federal Employers' Liability Act and amendments thereto (35 U. S. Stat. at L. 65, 36 U. S. Stat. at L. 291) (instructions numbers 10 and 18, R. 217, 219), and the Safety Appliance Act and amendments thereto (27 U. S. Stat. at L. 531, 29 U. S. Stat. at L. 85, 32 U. S. Stat. at L. 943) (instructions numbers 16, 17 and 18, R. 219); with reference to the definition of negligence (instruction number 11, R. 217); with reference to giving to the jury and subsequently withdrawing therefrom an instruction covering the movement of engine 2113 and the use of the power brakes (instruction number 39, R. 227).

(b) In admitting incompetent evidence in connection with the actions of William L. Turner, deceased, and his relation to the defendant (R. 58, 104) and in permitting the jury to consider matters and things not in evidence under instructions given in connection therewith (instructions numbers 22, 23 and 24, R. 221), which action of the trial court was approved by the Supreme Court of Oklahoma in the opinion of Mr. Justice Turner by specific reference.

If, in the opinion of the court, William L. Turner was not an independent contractor but was an employe of The Chicago, Rock Island and Pacific Railway Company and engaged in interstate commerce at the time of the accident, and was killed by reason of the negligence of the servants of this defendant, we insist the rulings of the trial court, referred to in the defendant's motion for a new trial, were prejudicially erroneous and prevented this defendant from having a fair trial. The Supreme Court of the State of Oklahoma, in affirming the said rulings of the said trial court, also committed error, in our judgment, and deprived this defendant of guaranties under the United States Constitution. The denial of these guaranties and the failure to give this defendant



a fair trial on the issues made by the pleadings in the said cause consisted of errors complained of in the assignment of errors set forth in the record at pages 5, 6, 7 and 8. In addition to the errors previously discussed we believe the trial court, in giving erroneous instructions and in refusing requested instructions, materially prejudiced this defendant's rights as will be shown by the instructions complained of, set forth in exact language, judged by the decisions of this court upon the same subject-matter.

**(1) Contributory Negligence.**

Over the exceptions of the defendant the trial court instructed the jury with reference to the defense of contributory negligence, interposed by the defendant.

"388. 10. If you believe from the evidence that the deceased, William L. Turner, was an employe of the defendant company, and was in the act of performing a duty of interstate commerce for said company when killed, and you further believe that both he and the said company were guilty of contributory negligence, without which he would not have been killed, then your verdict must be for the plaintiff; but you shall diminish the damages in proportion to the amount of negligence attributable to said Turner. Provided, however, that if you believe from the evidence that the train and cars

which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same, and that such failure contributed to the injury and killing, then you shall not hold the said Turner as being guilty of any contributory negligence, and shall not diminish the damages from that cause" (R. 217).

"18. You are instructed that, though you may believe from the evidence that Turner was guilty of contributory negligence at the time he was killed, yet if you believe that the engine and cars which ran over him and killed him were run by the defendant railway company in violation of any statute of the United States, and that such running of said engine and cars in such violation of such statute contributed to the killing of said Turner, you shall then not hold said Turner guilty of contributory negligence and the damages you shall find, if any, shall not be diminished by you by reason of his contributory negligence" (R. 219).

It is readily seen from the above instructions that the defendant was deprived of the force of the defense of contributory negligence by the manner in which the same was presented to the jury. The proviso linked the defense of contributory negligence with the question of whether or not the train power brakes were used at the time of the accident. The record will show no evidence which in

any way tends to establish the fact that the engine was not properly equipped with safety appliances and brakes as required by the Safety Appliance Act. It will not show that the two cars coupled to engine No. 2113 were not properly coupled to permit the use of the air brakes; there is no testimony in the record showing that the air brakes were not used. There is testimony, which is uncontradicted, that the engine and cars were properly equipped with air brakes, properly coupled together to permit the use of the air brakes and that the air brakes were used with an emergency application when the violent stop signal was given to the engineer by the brakeman on the northwest corner of the car which struck Turner.

This court has held in cases arising under the Federal Employers' Liability Act, that the railway company is entitled to the benefit of the defense of contributory negligence under proper instructions. The matter was considered in the cases of *Norfolk & W. Ry. Co. v. Earnest* (1913), 229 U. S. 114, 57 L. Ed. 1096, and *Seaboard A. L. R. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062. This denial of the force of this defense, we believe, entitled the defendant to a new trial. We believe the Supreme

Court of Oklahoma was in error in affirming the action of the trial court in refusing this.

(2) **Erroneous Interpretation of the Federal Employers' Liability Act.**

Accepting the plaintiff's theory that the deceased was an employe of the defendant and engaged in interstate commerce at the time of his death, the trial court gave to the jury instructions numbers 10 and 18, hereinafter set forth, as construing and administering the Federal Employers' Liability Act and the rights of the parties thereunder.

"388. 10. If you believe from the evidence that the deceased, William L. Turner, was an employe of the defendant company and was in the act of performing a duty of interstate commerce for said company when killed, and you further believe that both he and the said company were guilty of contributory negligence without which he would not have been killed, then your verdict must be for the plaintiff; but you shall diminish the damages in proportion to the amount of negligence attributable to said Turner. Provided, however, that if you believe from the evidence that the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same, and that such failure contributed to the injury and killing, then you shall not

hold the said Turner as being guilty of any contributory negligence, and shall not diminish the damages from that cause" (R. 217).

"18. You are instructed that though you may believe from the evidence that Turner was guilty of contributory negligence at the time he was killed, yet if you believe that the engine and cars which ran over him and killed him were run by the defendant railway company in violation of any statute of the United States, and that such running of said engine and cars in such violation of such statute contributed to the killing of said Turner, you shall then not hold said Turner guilty of contributory negligence and the damages you shall find, if any, shall not be diminished by you by reason of his contributory negligence" (R. 219).

It will be noted that the above instructions, which were previously discussed in connection with the defense of contributory negligence, are an improper construction and application of the Federal Employers' Liability Act to this cause of action. The two instructions above quoted each included the element of a breach of the Safety Appliance Act as an essential part thereof. As has been previously suggested, an examination of the record will show that there is no evidence showing a failure to comply with the requirements of the Safety Appliance Act with reference to the proper equip-

ment of the engine and cars with air brakes in compliance with the act. The air brakes were properly coupled up on the two cars coupled to the engine and responded perfectly when the emergency application was made. There is no evidence whatever of their being defective in any way or manner.

The giving of these two instructions was, we insist, an erroneous construction or administration of the Federal Employers' Liability Act and the Safety Appliance Act, under the evidence in this case. It is sought by the instructions to put upon the railway company, in connection with the proper use of the air brakes, the absolute standard required under the Safety Appliance Act. This is imposed as one of the duties of the railway company toward employes in actions brought under the Federal Employers' Liability Act. This construction, we insist, is not warranted by the decisions of this court upon the Safety Appliance Act and the Federal Employers' Liability Act. A proper interpretation and construction of the Federal Employers' Liability Act permits a railway company, in an action of this kind, to have the full effect of the defense of contributory negligence in diminishing the amount of damages recoverable under it.

We believe this position is clearly indicated by this court in the cases *Norfolk & W. Ry. Co. v. Earnest* (1913), 229 U. S. 114, 57 L. Ed. 1096; *St. Louis, I. M. & S. R. Co. v. McWhirter, Adm'r.* (1913), 229 U. S. 265, 57 L. Ed. 1179, and *Seaboard A. L. R. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062.

**(3) Erroneous Application of the Safety Appliance Act to the Cause.**

The trial court insisted that the provisions of the Safety Appliance Act were involved in the cause of action as alleged by the plaintiff in the amended petition upon which the cause was tried. We believe the instructions involving this question, given to the jury, numbered 16, 17 and 18, were an erroneous application of the provisions of the Safety Appliance Act to the facts in evidence in this case and were a limitation upon the defenses available to this defendant under the issues made by the pleadings if the court should hold that the deceased, William L. Turner, was an employe of the defendant, engaged in interstate commerce at the time of his death and that he was killed through the negligence of the defendant's servants.

"16. You are advised that a common carrier by railroad is engaged in interstate commerce when running its trains from one state to another

and that all trains which cross the line between two states are interstate trains, and their crews are called train crews and are engaged in interstate commerce. That this character attaches to each of such trains in all parts of its journey until it reaches its final destination. That all such trains are required to be equipped with train power brakes and that in the running of such trains such power brakes must be used and operated and failure so to do is violation of an express statute of the United States. That during the progress of such train, if it becomes necessary for it to leave cars at a station, or take on cars, that such operations do not take from it its character of an interstate train nor change its crew from being a train crew. That the duty remains in all parts of its operations to use and operate its train power brakes until it reaches its destination" (R. 219).

"391. 17. You are instructed as a matter of law, that in any train engaged in interstate commerce, operated by any common carrier by railroad, that not less than eighty-five per centum of the cars in such train shall have their cars equipped with train power brakes and, in running any such train, they shall have their train power brakes used and operated by the engineer of the locomotive drawing such train and all power-braked cars in such train which are associated together with said eighty-five per centum shall have their brakes so used and operated; that this is a matter of statute by the United States and the court instructs the jury that to operate a train which is



required to be so equipped, and which is so equipped, without using or operating such power train brakes is in violation of the statute of the United States" (R. 219).

"18. You are instructed that though you may believe from the evidence that Turner was guilty of contributory negligence at the time he was killed, yet if you believe that the engine and cars which ran over him and killed him were run by the defendant Railway Company in violation of any statute of the United States, and that such running of said engine and cars in violation of such statute contributed to the killing of said Turner you shall then not hold said Turner guilty of contributory negligence and the damages you shall find, if any, shall not be diminished by you by reason of his contributory negligence" (R. 219).

In the ninth paragraph of the amended petition upon which the cause was tried the plaintiff alleged a violation of the amendment to the Safety Appliance Act, approved March 2, 1903 (32 U. S. Stat. at L. 943) and a rule of the Interstate Commerce Commission made in accordance therewith. Section 2 of this amendment provides:

"Sec. 2. That whenever, as provided in said Act, any train operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-

braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

The engine, No. 2113, and the box car and flat car coupled to it were all properly coupled together and the air was in use on all of them. Plaintiff's theory of the phrase "used and operated," as found in Section 2, is that the failure to employ in any individual instance, to properly use to its full capacity or in its proper manner, the air brakes on the engine and cars coupled together, subjects the defendant to an absolute liability for the consequences, although the engine and cars were properly equipped with air brakes which were, at the time of this use, in proper condition. We believe this construction is not sustained by the decisions of this court.

Mr. Justice Moody, in *St. Louis, I. M. & S. Ry. Co. v. Taylor*, *Adm'x.* (1908), 210 U. S. 281, 52

L. Ed. 1061, discussed the construction of the act, holding the duty absolute with reference to the prohibition against the use of any cars not equipped in accordance with the act. He said:

p. 1068. "In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

In the case of *Delk v. St. L. & S. F. R. Co.* (1911), 220 U. S. 580, the construction of the act was involved in a question certified from the Circuit Court of Appeals of the Sixth Circuit. After

reviewing the record the court, speaking by Mr. Justice Harlan, said:

p. 589. "In this view, the judgment of the Circuit Court of Appeals must be reversed because, for the reasons above stated, it erred in not holding that the statute, under which the case arose, imposed on the carrier an absolute duty to provide its cars, when moving in interstate traffic, with the required couplers and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty."

The interpretation of the act, shown in the above cases, has not been modified by this court. There is no evidence in this record showing any failure on the part of the defendant to have the engine 2113 and the two cars coupled with it properly equipped in accordance with the Safety Appliance Act, nor to properly maintain the equipment as provided therein.

The record shows it was so equipped and in proper condition at the time of the accident complained of in the amended petition. We believe the trial court's instructions above set out materially prejudiced the defendant and prevented it from having a fair trial.

**(4). Erroneous Definition of Negligence.**

The court gave to the jury for their guidance

a definition of negligence which we believe was not only confusing but improper as a matter of law. Important elements are wanting in the definition and a statement of immaterial features included in their stead. The definition was contained in Instruction No. 11, which is as follows:

“11. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen” (R. 217).

This Court has approved a definition of negligence, judged by which, Instruction No. 11 of the trial court just quoted, we believe, is erroneous. In *Baltimore & P. R. Co. v. Jones* (1877), 5 Otto 439, 24 L. Ed. 506, Mr. Justice Swayne defined negligence for the court as follows:

p. 507. “Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion.”

The above definition was approved by this Court in an opinion by Mr. Justice Brown in *St.*

*Louis & S. F. Ry. Co. v. Schumacher* (1894), 152 U. S. 77, 38 L. Ed. 361. In that case an employe was riding on the side of a flat car with his feet hanging over in a position from which he could be easily jostled off. He did not hear a warning shout when in that position and had been warned not to ride on the car, but to take his place in the caboose. A collision occurred, injuring him, and the cars were handled at an unusual rate of speed.

The negligence charged against the defendant was the backing of the train at an excessive speed. In approving the case of *Baltimore & P. R. Co. v. Jones*, on the question of negligence, the court held that a verdict should have been directed for the defendant.

Instruction No. 11, in view of the cases referred to, we believe, was not only an improper abstract statement of the law, but a confusing one to the jury which misled them, to the prejudice of this defendant.

**(5) Withdrawal of Instruction No. 39.**

After the court had instructed the jury and the argument of the case had been made by counsel, the jury withdrew for the consideration of the

evidence and to deliberate upon their verdict. Thereafter the jury desired further instruction with regard to the meaning of Instruction 39 of the charges given to them by the court (R. 224). The following proceedings were had at this time, as shown by the record:

“Thereupon, at the hour of 5:45 o’clock, p. m., of this day, viz., December 2, 1913, the jury empaneled and sworn to try the issues in this cause return into open court in charge of their sworn bailiffs, the plaintiff being present by John C. Moore, his counsel, and the defendant being present by J. C. Roberts, its counsel, and it is admitted by counsel for plaintiff and defendant that the jurors are all present in open court in the jury box.

“Thereupon, the court asks the jury if they have agreed upon a verdict, and their foreman replies that they have agreed to come into open court and ask for additional instructions or for an explanation of a certain instruction embodied in the court’s instructions, and the jury is advised by the court to submit their request in writing (R. 228).

“Thereupon, Fred Walker, the foreman of the jury, in open court, submits the following to the court, viz.:

“Hon. Jas. W. Steen:

“The jury in the Bond., Admr., v. R. I. R. R. Co. as a whole requests explanation as follows:

“Part of the body contends that this Section 39 relieves the R. R. Co. from liability of negligence if they were running at a high rate of speed.

“A part of the jury further contends that this paragraph only pertains to the use of the brakes.

“FRED WALKER, Foreman.”

“410—By the Court: Gentlemen of the Jury: The court now withdraws from your consideration Instruction No. 39, mentioned in your request, it appearing that said instruction was given and embodied in the charge through a mistake.

“By Mr. Roberts: The defendant objects to the withdrawal of Instruction No. 39 from the jury, it appearing at this time that the jury has been out for several hours.

“By the Court: On examination of Instruction No. 39, I find by mistake that it was included in the instructions, and I now withdraw it.

“By Mr. Roberts: To which the defendant objects.

“By the Court: Gentlemen of the Jury: How do you stand?

“By the Foreman: We have unanimously agreed that that Instruction No. 39 be explained.

“By the Court: Have you taken a poll?

“By the Foreman: Only on some things” (R. 229).



The instruction referred to in the above request of the jury had reference to the allegation contained in sub-division o of the 10th paragraph of plaintiff's amended petition. The instruction is as follows:

"39. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the engineer on engine No. 2113 was running his train at a high rate of speed and in not using the train power brakes by which he might have controlled its speed or have stopped it when signaled to do so as alleged in sub-division o of the 10th paragraph of plaintiff's petition" (R. 224).

The request of the jury is evidence of the confusing nature of the instruction. The record discloses no evidence of a failure on the part of the engineer on engine No. 2113 to use the train brakes. The withdrawal of the instruction from the jury left them without guidance upon this phase of the instruction. We believe the court committed error in withdrawing the instruction under the circumstances above set out and that this error prejudiced the consideration of this case by the jury from the standpoint of the defendant.

**(i) The Admission of Incompetent Evidence.**

We desire to call the attention of the Court to the erroneous admission of incompetent evidence,

as preventing the defendant from having a fair trial. The evidence herein set forth was introduced for the purpose of showing that Turner, at the time of his death, had terminated the private business in which he had evidently been engaged, after visiting the Enid Ice and Fuel Company and the Enid Mill and Elevator Company, from which places he was returning to the west side of the yards. During the crossing of the tracks there he was killed.

The witness W. M. Hutchinson was asked to testify with regard to this matter and the court at first excluded the testimony, as shown by the following passage:

“By COL. JNO. C. MOORE (In low tones to reporter): I want to make this offer: Plaintiff offers to prove by this witness that when the deceased heard the train whistle he took out his watch and looked at it and said, ‘That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes.’

By W. H. MOORE: To which offer the defendant objects.

By THE COURT: The objection will be sustained.

By JNO. C. MOORE: Plaintiff excepts.

By THE COURT: Exception allowed” (R. 58, 59).

Subsequently plaintiff's counsel insisted that this evidence was competent as a part of the *res gestae*. Later, during the trial, the court reversed his ruling and admitted the testimony, as shown by the following passage:

“Q. Mr. Hutchinson, you may state when you and Mr. Turner heard the whistle of train 24, what Mr. Turner did and said?

BY MR. MOORE: May it be understood that this all goes in subject to our objection. We object as incompetent, irrelevant and immaterial, calling for a conversation with the deceased not in the presence of the defendant and no part of the *res geste*.

BY THE COURT: Objection overruled, and admitted for the purpose of explaining his conduct in going across the tracks of the defendant.

BY W. H. MOORE: To which the defendant excepts. And it is understood that as the other questions of this character come in that the same objection goes to it.

BY THE COURT: Very well. I think the form of that question might be changed a little; what, if anything, did he do; it might be admissible as verbal acts.

BY JOHN C. MOORE: State when you and Mr. Turner heard train 24 whistle for the station, what did Mr. Turner do, if anything?

A. (189) He pulled out his watch and said: ‘There is 24; I will have to take my

tickets to the freight depot and go and order coal for the chutes.'

Q. Which way did he go then?

A. He turned around and walked back west towards the freight depot" (R. 104).

In referring to the subject matter contained in the above quotation, Mr. Justice Turner of the Oklahoma Supreme Court, in his opinion in the case says:

"On the strength of which, we hold that deceased was engaged in interstate commerce while making his way to the freight house with these tickets in his hand. We say he had these tickets in his hand at the time he was killed for the reason that the evidence reasonably tends to prove that fact, although they were never found, so far as the record discloses. Had they ever been (R. 277) found after the injury under circumstances showing that he did not have them at the time, defendant would not have been slow to disclose that fact. Their absence can be accounted for and the jury might have fairly inferred from the evidence that after he left Conway at four o'clock to go to the coal chutes he got them and had them in his possession when at five o'clock he said to Hutchinson that he must go and turn them in and started for the freight house and that they were blown away by the force of the high wind prevailing at that time or were otherwise lost in the excitement of the casualty" (R. 278).

We believe under the rules on evidence in

free in the Federal Courts that this evidence did not constitute a part of the *res gestae* and was improperly admitted as such. A brief but clear statement of the doctrine of *res gestae* is found in an opinion of the court written by Mr. Justice Swayne in the case of *Travelers' Ins. Co. v. Mosley* (1869), 8 Wall. 397, 19 L. Ed. 437, where it is said:

p. 441. "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the *verbal fact* would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. The doctrine of *res gestae* was considered by this court in *Beaver v. Taylor*, 1 Wall. 637 (68 U. S. XVII., 601). What was said in that case need not be repeated. Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudica-

tions is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below."

This statement, we believe, has not been modified by this Court in any of the cases subsequently citing the same upon this point. If the admissibility of the evidence is to be judged by the rules of evidence laid down by Oklahoma practice, we believe the matter is equally inadmissible. In *Coalgate v. Hurst* (1910), 25 Okl. 588, 107 Pac. 657, Mr. Justice Williams uses the following language in regard to the admissibility of evidence as *res gestae*:

p. 597. "Was it a part of the *res gestae*? If so, it should have been admitted. Otherwise not. Was the alleged statement spontaneous and so connected with the main fact under consideration as to illustrate its character, or to form in conjunction with it one continuous transaction? Jenkins was a servant of the master and may have fired this shot that caused the accident and when confronted with his co-employee, with the inquiry as to where his 'buddy' was, being apprehensive as to the consequence of his act, he may have sought to escape such responsibility by placing it upon his co-employee. It does not appear that the ruling of the court in the exclusion of this evidence under the circum-

stances was error. *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196; *Fredenthal v. Brown & McCabe*, 52 Ore. 33, 95 Pac. 1116; *L. & N. R. Co. v. Pearson, Adm'r.*, 97 Ala. 211, 12 South. 176."

In the case of *City of Wynnewood v. Cox* (1912), 31 Okl. 563, 122 Pac. 528, Mr. Justice Dunn follows the rule laid down in the case of *Coalgate v. Hurst* and quotes with approval the following passage from Wharton on Criminal Evidence:

p. 576. "'*Res gestae*,' as said by Mr. Wharton in his work on Criminal Evidence (Section 262), 'are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that speaks. In such cases, it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself.'"

Wigmore on Evidence names three requirements of evidence which is properly admissible on the *res gestae* exception to the hearsay rule:

- (a) A startling occasion.
- (b) A statement made so closely connected

with the act as to exclude the time for deliberation or misrepresentation.

(c) The relation of the statement to the circumstances of the accident (3 Wigmore, Section 1750).

The statement made by the deceased, Turner, at the time he heard passenger train No. 24 whistle for Enid, namely, "There is 24; I will have to take my tickets to the freight depot and go and order coal for the chutes," we believe is not in any way connected with the startling occasion which caused his death; is not a statement made under nervous excitement or while the reflective powers were in abeyance, and was not, in any way, connected with the accident upon which the cause of action was based. They were prior to the accident in point of time, made under no stress of excitement and had nothing whatever to do with the collision between himself and the backing engine and cars. We believe it was erroneous to admit this testimony.

**(2) Instructions on Matters Not in Evidence.**

Instructions numbers 22, 23 and 24, as given by the court to the jury, are in the following language:



"22. You are instructed that the mortality tables of American experience in expectancy of life may be considered by you in determining how many years the deceased, William L. Turner, might have lived had he not been killed, and such expectancy may be considered by you as an element in measuring damages in this cause; provided, your verdict shall be for the plaintiff; and another element you may consider in measuring such damages is the evidence of his earnings, annually, monthly or weekly, as the same may appear to you. But you are advised that both of these elements will not justify you in finding any sum whatever for the plaintiff, and that before you can do so you must determine from the evidence how much he contributed to the support of each one dependent upon him, or to whose support he contributed, and the sums he contributed, either annually, monthly, weekly or otherwise, as it appears to you from the evidence, and the periods of time each should expect the continuation of such sums had he not been killed. From these elements separately you may determine what sums he would have contributed had he not been killed, and the aggregate of such sums may be considered by you in determining the sum of damages suffered by all of the beneficiaries. In determining how long contributions might be expected from him to those dependent upon him you may take into consideration his legal duty to support each of the beneficiaries" (R. 220, 221).

"23. (394) If your verdict is for the plaintiff, and you believe that the widow, Ida M. Turner,

as a beneficiary, would in the course of nature live longer than the deceased, William L. Turner, would have lived had he not been killed, then you may consider his expectancy of life as an element of the damages she has suffered; that is an element in the calculation of the damages she has suffered, and you may also consider the annual, monthly or weekly allowances she had been accustomed to receive from him for her own use, and from these you may determine the sum that she has been deprived of and will be deprived of by reason of the same being stopped by his death. You are not to consider her mental anguish, loss of companionship or advice, nor any element of damages but the sums of which she has been deprived and which she had been accustomed to receive from him" (R. 221).

"24. If your verdict is for the plaintiff, you may consider the age of each child who is named as a beneficiary in this action at the time said William L. Turner was killed, and as an element and measure of damages to each child, you may consider the time to elapse until such child is by law emancipated from the control of its parents; and as a further element and measure of the damages sustained by each child, you may consider the annual, monthly or weekly allowances appropriated out of his funds and contributed by him to the support of the family, as the evidence may disclose, and from the facts thus obtained by you, you shall determine what damages each of said children have sustained by being deprived of such allowances, and after determining the same, you

shall make return, along with your verdict, of such sums separately to each child by name, and also to the widow" (R. 221).

The above instructions were offered to the jury to conform to the requirements of the cases, *Michigan C. R. Co. v. Vreeland* (1913), 227 U. S. 59, 27 L. Ed. 417, and *American R. Co. v. Didricksen* (1913), 227 U. S. 145, 57 L. Ed. 456. The court in giving these instructions overlooked the fact that there was no evidence in the record showing the expectancy of any of the beneficiaries named. The widow gave certain testimony with reference to the necessary expenses in order to properly care and educate the children of the deceased. The age of each of the beneficiaries is given, but nothing with reference to their state of health or physical condition. They did not testify, and so far as the record shows, the jury were not informed in any way with reference to their expectancy. The amount of damages recoverable for the pecuniary loss sustained by beneficiaries in the death of a deceased should be based upon the joint lives of the deceased and the beneficiaries. The federal courts, in applying the admiralty law of the United States, have followed this rule. The state courts in turn, in applying the doctrine of

comparative negligence, have also adopted the rule. In "The Dauntless" (1913), 121 Fed. 420, the court said:

p. 423. "The American Tables of Mortality show that the life expectancy of deceased was 27½ years or thereabouts, but the life expectancy of those dependent upon his is a material fact in this case. The question is, what pecuniary damages have they sustained by his death and it is manifest that the damages must be less when the life expectancy of the surviving dependent relatives is only a few years than could properly be awarded in a case in which the life expectancy of the surviving relatives is for a longer period of time. The life expectancy of the mother of the deceased is only about 7½ years; that of the father less, and that of the invalid sister a matter wholly of conjecture."

We insist that by the instructions above given the jury were permitted to consider matters and things not in evidence in ascertaining the amount of damages to be awarded to the individual beneficiaries in case they should return a verdict for the plaintiff.

### CONCLUSION.

The argument of the motion to dismiss and to affirm in this case has been presented in another brief, previously filed.

It is respectfully urged to the Court that the facts disclosed by the record upon the merits of the cause show that the relations existing between William L. Turner, deceased, and the defendant in this case were governed by the written contract, marked Exhibit "A" and attached to plaintiff's amended petition. This contract, it seems clear to us, as a matter of law, establishes the relation of an independent contractor between the parties and not that of master and servant. The record is wanting in evidence showing that William L. Turner was engaged as an employe of this defendant in interstate commerce at the time of his death or that there was a violation by the members of the train crew in charge of engine 2113 and the cars connected therewith of any duty which they owed to him. The proceedings of the trial court in the denial of the defense of contributory negligence and the improper construction and administration of the Federal Employers' Liability Act, in the instructions to the jury with reference to the use of the air brakes under the Safety Appliance Act, as well as the errors in the admission of incompetent testimony, are sufficient to our minds to amount to a denial of a fair trial of the issues in the case. The Oklahoma Supreme Court,

in its opinion, holding the deceased, William L. Turner, an employe engaged in interstate commerce at the time of his death and killed by the negligence of the defendant's servants, approved the alleged errors of the trial court and, we insist, committed error which we now present for review to this Court. It is respectfully submitted that the errors complained of herein show the judgment of the trial court to be erroneous and that the same should be reversed, and this defendant granted a new trial.

Respectfully submitted,

..... J. H. Gamble .....

..... R. J. Roberts .....

*Attorneys for Plaintiff in Error.*

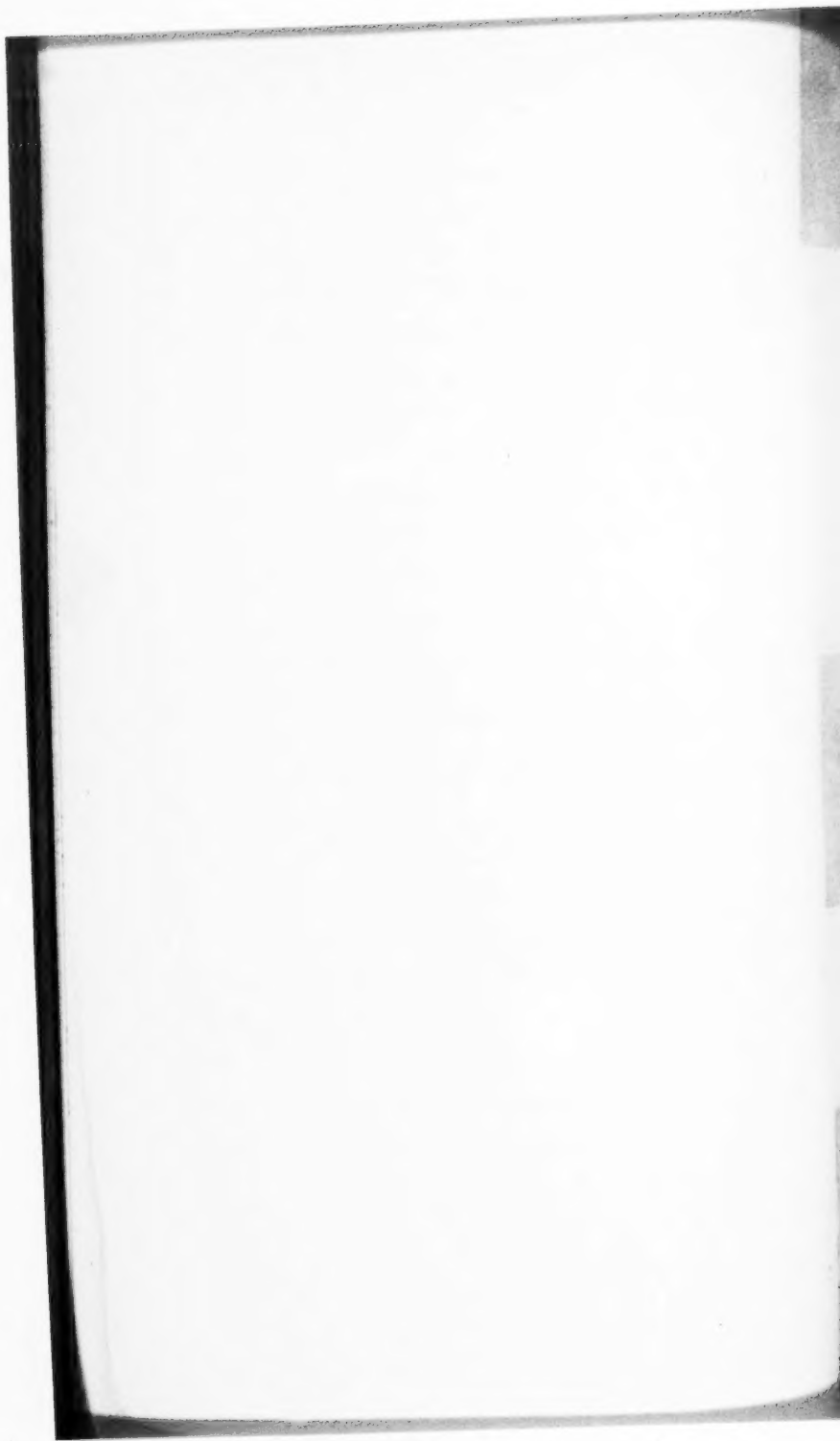
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February 1, 1916.



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IN THE

**Supreme Court of the United States.**

OCTOBER TERM, A. D., 1915.

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No. 486.  
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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, *Plaintiff in Error*,

*vs.*

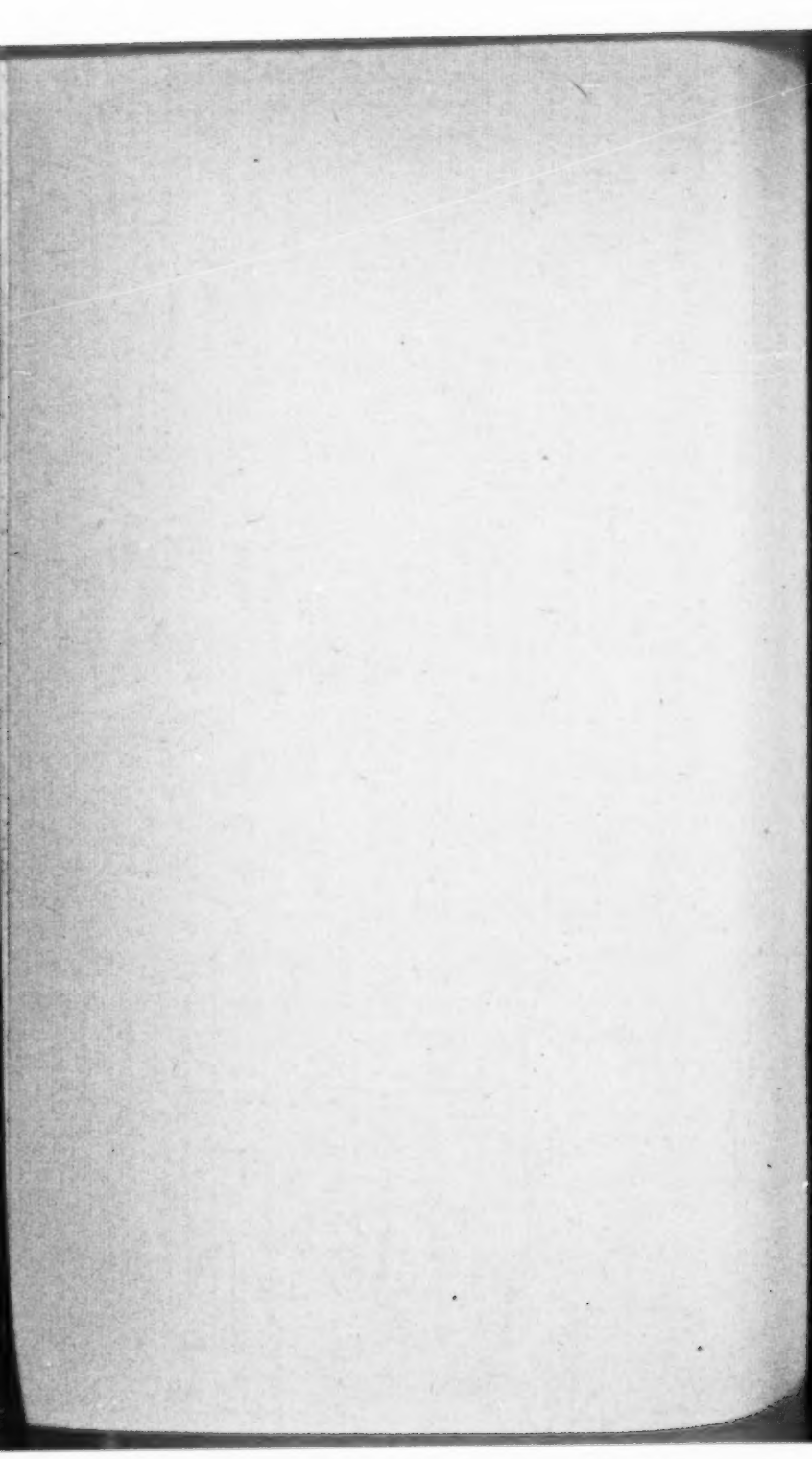
A. P. BOND, ADMINISTRATOR OF THE ESTATE OF WIL-  
LIAM L. TURNER, DECEASED, *Defendant in Error*.

—  
BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR,  
OPPOSING MOTION TO DISMISS AND AFFIRM.

—  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D., 1915.

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No. 486.

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, *Plaintiff in Error*,

*vs.*

A. P. BOND, ADMINISTRATOR OF THE ESTATE OF WIL-  
LIAM L. TURNER, DECEASED, *Defendant in Error*.

---

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR,  
OPPOSING MOTION TO DISMISS AND AFFIRM.

---

STATEMENT OF THE CASE.

This action was originally instituted by defendant in error in the District Court of Garfield County, Oklahoma, against plaintiff in error, to recover damages alleged to have been sustained on the part of

certain named beneficiaries by reason of the wrongful death of plaintiff's intestate. The original petition of the plaintiff, as is disclosed by the record in this court, was expressly predicated upon the terms of the Federal Employers' Liability Act of April 22, 1908 (35 Stat., 65), it being alleged that plaintiff in error (defendant below) was a railroad corporation engaged in interstate commerce and that plaintiff's intestate, at the time of his death, was in the service of the defendant corporation under two distinct and separate written contracts, copies of which were attached thereto, one of which contracts covered the unloading of coal into chutes erected and maintained by the defendant for the supply of its engines engaged in pulling trains in interstate commerce, as well as in its switch yards, and the second of which contracts covered the cooping of cars of grain.

Upon a petition and bond filed by plaintiff in error (defendant below), the State court ordered the cause removed to the United States District Court for the Western District of Oklahoma, wherein defendant in error (plaintiff below) filed a motion to remand, which was heard after the taking of evidence, and the cause remanded to the State court.

Thereafter, plaintiff filed an amended petition, basing his cause of action, as shown by the positive allegations thereof, upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat., 65), and included therein allegations of the violation of the Federal Safety Appliance Act of March 22, 1893 (27 Stat., 531), as amended by Section 2 of the Act ap-

proved March 2, 1903 (32 Stat., 943). Plaintiff in error, as defendant below, by motion sought to strike from the petition the allegations thereof with respect to the violation of the Safety Appliance Acts, because the same was irrelevant and immaterial to the issues and insufficient in point of fact and law, but such motion was overruled and exceptions thereto duly reserved.

The sufficiency of the petition as amended was also attacked by demurrer, which was overruled and exceptions reserved, and plaintiff in error, as defendant, answered to the petition, first, by way of general denial coupled with the admission of its incorporation, as well as that it owned and operated a line of railway into and through the State of Oklahoma; and, as a separate defense, that the injuries sustained by the plaintiff's intestate, from which he died, were proximately caused by his own negligence, and for a further defense, alleging the contributory negligence of plaintiff's intestate. A reply, general in form to this answer, was filed, and upon the issues thus joined trial was had.

The sufficiency of the evidence to sustain a recovery by the defendant in error (plaintiff below) was raised by a demurrer to the plaintiff's evidence at the close thereof, as also by a motion for a directed verdict in favor of plaintiff in error (defendant below), and exceptions were duly reserved. Plaintiff in error, as defendant, requested in writing certain special instructions to the jury, a copy of the same being attached hereto as Exhibit "A," but the court refused to give to the jury the instructions as re-

quested, and to the court's action in this respect exceptions were duly reserved. The court instructed the jury in writing, a copy of its instructions being attached hereto as Exhibit "B." To the giving of several of the paragraphs of the instructions as given, plaintiff in error, as defendant, in keeping with the provisions of the local statutes, duly excepted.

The cause having been submitted to the jury, a verdict was returned in favor of the defendant in error (plaintiff below), and against the plaintiff in error (defendant below). A motion for a new trial was duly filed, a copy of which is attached hereto as Exhibit "C," but the court overruled the said motion for a new trial, and the plaintiff in error (defendant below) duly reserved exceptions thereto.

Thereafter, and in accordance with the prescribed procedure, an appeal was perfected to the Supreme Court of the State of Oklahoma and the cause duly submitted to said court, which rendered its opinion, affirming the judgment of the lower court, a copy of the opinion of the Supreme Court of the State of Oklahoma being hereto attached as Exhibit "D." Thereafter proceedings were taken to procure a writ of error from this court to the said Supreme Court of Oklahoma, by which was sought a review of the action of said court in affirming the judgment in this cause, and, in connection therewith, plaintiff in error prepared and filed certain assignments of error, a copy of which, for the convenience of the court, is hereto attached as Exhibit "E."

The cause was duly docketed in this court, and the defendant in error has filed a motion to dismiss and to affirm for want of jurisdiction.

#### ARGUMENT.

From the copy of the motion to dismiss served on counsel for plaintiff in error as well as the brief of argument attached thereto, it appears that the defendant in error, in support of the contention that this court is without jurisdiction to entertain this appeal, relies upon the propositions following:

(1) That the plaintiff in error has asserted no right nor claimed any immunity arising under or by reason of the Constitution or any statute of the United States against which there has been a decision.

(2) That although the record discloses the assertion of formal rights or claims of immunity arising under or by reason of statutes of the United States, the same are so wanting in foundation and unsubstantial as to be devoid of any merit and frivolous and not made in good faith.

(3) That the action of the United States District Court after removal of the cause thereto in remanding the same to the State court, is conclusive of the rights asserted and immunities claimed as arising under or by reason of statutes of the United States.

We shall endeavor to present in this brief the argument in opposition to the propositions in the order stated, although, to some extent at least, the proposi-



tions involve the same subject-matter and therefore are susceptible to the same argument.

It would seem from reading the brief of argument of defendant in error it is contemplated, that in the consideration of his motion to dismiss, this court will review the whole of the record and in a large measure determine the merits of the controversy presented to it by this appeal. We do not understand the office of a motion to dismiss to include a consideration of the whole of the meritorious controversy presented, in the manners prescribed by law, to this court for its final determination. There are several vital questions involved in this case, as to each of which we earnestly desire to present to the court on final hearing a full brief and argument. As we view it, however, the disposition of the motion to dismiss now under consideration need not be confused with the decision of the question presented by the appeal, and, indeed, we feel that the court will not be attended by great difficulty in disposing of the motion to dismiss, hence we proceed directly to a discussion thereof.

## I.

In answer to the first proposition urged in support of the motion that the plaintiff in error has asserted no right nor claimed any immunity arising under or by reason of the Constitution and statutes of the United States, we call to the court's attention the following allegations of the amended petition of the defendant in error (plaintiff below) upon which this case was tried:

“And plaintiff therefore says, that the defendant, while engaged in interstate commerce as a common carrier by railroad, by the careless, negligent, wrongful and unlawful acts of its agents, servants and employees, as above set out and detailed, was guilty of negligence, carelessness, wrongful and unlawful running of said engine 2113 in backing in said track two, and pushing said cars and engine over and killing him, the said William L. Turner, when he was at the time engaged in performing an act of interstate commerce for the defendant as its employee, in said track two of said yards, in the City of Enid, Garfield County, Oklahoma, at the time stated, and not through any contributory fault or negligence on his part.”

In addition to this allegation, there was contained in the petition an allegation, as follows:

“9. That in pushing said cars by said engine No. 2113, as stated and by which the said William L. Turner was killed, the said engine and cars, and as a train was operated and used by the enginemen and train crew in violation of a statute of the United States, to-wit: Section 2 of an Act to amend an Act, entitled, ‘An Act to protect the safety of employces and travelers upon railroads by common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with drive-wheel brakes and for other purposes,’ approved March 2, 1893, and amended April 1, 1896, in that the continuous train power brakes with which said engine and cars were equipped were not used and operated

by the engineer or other person in charge of said engine, 2113, while backing on track two, as heretofore stated, nor at any time before the said train had reached said Turner, nor thereafter until the whole of said train had passed entirely over his body and as much as three car lengths farther, and that the speed of said engine and cars was not placed under the control and power of said continuous power brakes, but was proceeding under the force of the engine, pushing, and such train power brakes were not then and there used and operated to control the speed nor for stopping, nor for other purpose. That said act was in further violation of said statute in this, that it was in violation of a rule of the Interstate Commerce Commission of the United States made on the 6th day of June, 1910, made under and by virtue of the requirement of the said section above named, directing said order to be made that for the reasons above stated, the said train was not controlled in its speed, and this caused said train to strike, kill and pass over the body of the said William L. Turner."

And the further allegation:

"The engineer was guilty of negligence in running his train at high rate of speed and in not using the train power brakes by which he might have controlled its speed or have stopped it when signalled so to do. He was guilty of negligence in running his train in excess of the speed established by ordinance of the city."

And,

"He was guilty of most culpable negligence in running his train in violation of the statute of the United States as heretofore detailed."

Attached to the petition are copies of certain contracts under which it was alleged that the plaintiff was employed by the defendant in interstate commerce, being the same contracts heretofore referred to.

It will thus be seen that this action is expressly predicated upon the Federal Liability Act (35 Stat., 65), coupled with allegations of the violation of the Safety Appliance Acts of March 22, 1893 (27 Stat., 531), as amended by the Act of March 2, 1903 (32 Stat., 943), as also the regulations of the Interstate Commerce Commission thereunder.

In the trial court the sufficiency of the plaintiff's amended petition was attacked by demurrer; the sufficiency of the evidence to justify a recovery by plaintiff (defendant in error) was attacked by demurrer to the plaintiff's evidence; by motion for a directed verdict in favor of the defendant (plaintiff in error); and by certain requested instructions in writing, in each of which instances the ruling of the court was adverse to the claim of plaintiff in error (defendant below) and exceptions duly saved.

In support of the various steps taken by plaintiff in error attacking the sufficiency of the plaintiff's petition and evidence, as also the action of the court in giving to the jury certain instructions in writing, especially those concerning the application of the Safety Appliance Acts, plaintiff in error urged the following five propositions:

- (1) That plaintiff's intestate, on account of whose death the action was instituted, was an in-

dependent contractor and not an employee of the defendant engaged in interstate commerce within the terms of the Federal Employers' Liability Act (35 Stat., 65).

(2) That plaintiff's intestate, on account of whose death this action was instituted, at the time of receiving the injuries from which he died, was engaged in the performance of a contract between himself and a private industry, and not in the employment of the defendant.

(3) That there was no sufficient evidence of negligence on the part of the defendant, its agents or employees, proximately causing, or contributing to, the injuries sustained by the plaintiff's intestate and from which he died, and on account of whose death this action was instituted, and that, therefore, there was no sufficient evidence to sustain the action under the terms of the Federal Employers' Liability Act (35 Stat., 65).

(4) That there was no evidence showing a violation of the Safety Appliance Act of March 22, 1893 (27 Stat., 531), as amended by the act of March 2, 1903 (32 Stat., 943), and that the court, therefore, erred in instructing the jury that the recovery of the plaintiff could not be diminished by reason of the negligence of plaintiff's intestate when injuries resulted from a violation of the Safety Appliance Acts.

(5) That the court below, in his instructions to the jury, as also in the refusal of the instructions requested by the plaintiff in error (defendant below) erred in his construction of the Safety Appliance Act of March 22, 1893 (27 Stat., 531), as amended by the act of March 2, 1903 (32 Stat., 943).

In the brief of argument of defendant in error accompanying his motion to dismiss the cause, the action admittedly was predicated upon the acts of Congress enumerated, but counsel, while insisting upon rights of defendant in error arising by virtue of such acts of Congress, quite evidently overlooks the fact that, by virtue of the expressed terms of the statutes, themselves, the causes of action created thereby are limited to certain classes under certain conditions. If the court below in holding these statutes applicable to the issues made by the pleadings and facts disclosed by the evidence exceeded the limits prescribed by the terms of the statutes themselves, then undoubtedly there has been indulged an erroneous construction of statutes of the United States, and where, as now, plaintiff in error objected to such erroneous construction of the acts and insisted upon a correct construction thereof. The denials of its claims were decisions of federal questions, and as such reviewable in this court by writ of error to the court of last resort of the State.

In the case of *St. Louis, I. M. & S. Ry. Co. vs. Taylor*, 210 U. S., 281, this court, in speaking to the question now under consideration, said:

“The judicial power of the United States extends ‘to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.’ Article III, Section 2, Constitution. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case ‘arising under

\* \* \* the laws of the United States.' It was settled, once for all time, in *Cohens vs. Virginia*, 6 Wheat., 264, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of State courts so far as they pass upon a law of the United States. It was said in that case (p. 416): 'They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided'; and it was further said (p. 379): 'A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.' But the appellate jurisdiction of this court must be exercised 'with such exceptions and under such regulations as the Congress shall make.' Article III, Section 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court over the State courts by Section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock vs. Memphis*, 20 Wall., 590, 620. The words of that section material here are those authorizing this court to reëxamine the judgments of the State courts 'where any title, right, privilege, or immunity is claimed under \* \* \* any statute of \* \* \* the United States, and the decision is against the title, right, privilege, or immunity specially set

up or claimed under such \* \* \* statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick vs. Market Bank*, 165 U. S., 538; *California Bank vs. Kennedy*, 167 U. S., 362; *San Jose Land and Water Co. vs. San Jose Ranch Co.*, 189 U. S., 177; *Nutt vs. Knut*, 200 U. S., 12; *Rector vs. City Deposit Bank*, 200 U. S., 405; *Illinois Central Railroad vs. McKendree*, 203 U. S., 514; *Eau Claire National Bank vs. Jackman*, 204 U. S., 522; *Hammond vs. Whittredge*, 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."



In *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S., 265, the court, speaking by Mr. Chief Justice White, said:

"As we have seen the pleadings in express terms exclusively based the right to relief upon the statutes of the United States and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a State court, our power to review is controlled by Rev. Stat., Sec. 709, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. *Seaboard Air Line Ry. vs. Duvall*, 225 U. S., 477; *St. Louis, I. M. & S. R. Co. vs. Taylor*, 216 U. S., 281. And of course as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination.

*Swafford vs. Templeton*, 185 U. S., 487.

"This is true since the finding that there was

some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a State court the power to review is controlled by Rev. Stat., Sec. 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. Ry. v. Albers Commission Co.*, 223 U. S., 573, 591; *Creswill vs. Knights of Pythias*, 225 U. S., 246."

In *Strauss vs. American Publishers' Ass'n*, 231 U. S., 235, the court, speaking by Mr. Justice Day, said:

"It is thus apparent that, when the defendants below set up the copyright statute of the United States as an authority for the agreement of the character here in question, the plaintiffs contended that such agreement was not only beyond the authority conferred in the copyright act but was in violation of the Sherman Anti-Trust Law, making illegal combinations in restraint of trade and tending to monopoly. This contention was in terms denied by the lower court and the decision upon the facts went to the Court of Appeals with the result which we have stated. The contention thus made as to the effect of the Sher-

man Anti-Trust Act when read in connection with the copyright act of the United States presented a question of Federal character to the State courts, which claim of Federal right was necessarily denied in the decision of the Court of Appeals, affirming the judgment of the court below. One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a State court, may bring the case here for review under section 709 of the Revised Statutes, now Section 237 of the Judicial Code. *Nutt vs. Knut*, 200 U. S., 12; *St. Louis & Iron Mountain Ry. vs. Taylor*, 210 U. S., 281; *St. Louis & Iron Mountain Ry. vs. McWhirter*, 229 U. S., 265. The motion to dismiss for want of jurisdiction must therefore be overruled."

In *Seaboard Air Line vs. Horton*, 233 U. S., 492, the court, speaking by Mr. Justice Pitney, said:

"There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the State court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity for the action, this motion must be denied, upon the authority of *St. Louis, Iron Mountain & Southern Ry. vs. McWhirter*, 229 U. S., 265."

See also:

Seaboard Air Line Ry. Co. vs. Duvall, 225  
U. S., 577;  
Southern Ry. Co. vs. Crockett, 234 U. S., 725,  
at p. 730.

That the rights asserted and immunities claimed as arising under and by reason of statutes of the United States, as hereinbefore set forth were presented to and denied by the trial court is evidenced by the ruling upon the motion of plaintiff in error (defendant below) to strike from the petition of the plaintiff the allegations concerning the violation of the Safety Appliance Acts referred to, as also its demurrer to the evidence of defendant in error (plaintiff below), and its motion for a directed verdict in its favor. Further evidence of this fact is disclosed by defendant's requested instructions numbered one, seventeen, and twenty-two, which were refused by the court and the instructions of the court numbered ten, sixteen, seventeen, eighteen and twenty-one of the instructions given to the jury over the exception of plaintiff in error.

That such assertions and claims were presented to the Supreme Court of the State of Oklahoma, the same being the court of last resort of that State, is evidenced by the opinion of the court wherein it is held, first, that plaintiff's intestate was an employee of plaintiff in error (defendant below) and not an independent contractor; second, that the evidence was sufficient to justify the submission to the jury of

the question whether the decedent was killed while engaged in interstate commerce and in the employ of the defendant; third, that the evidence was sufficient to justify the submission to the jury of the negligence of the plaintiff in error (defendant below); and, fourth, that the evidence was sufficient to justify the submission to the jury of the question whether the engine of the defendant was operated in violation of the Federal Safety Appliance Acts, hereinbefore referred to, and the further holding that the evidence showing that the engineer failed to use and operate continuous train power brakes was sufficient to show a violation of said acts.

The assignments of error included in the record in this court, a copy of which is attached hereto as Exhibit "E," present with particularity the action of the Supreme Court of the State of Oklahoma in rendering its decision adversely to the rights asserted and immunities claimed as arising under and by reason of the statutes of the United States enumerated.

In the language of this court in the case of St. Louis, I. M. & S. R. Co. vs. Taylor, *supra*, "There can be no doubt that the claim made here was specifically set up, claimed and denied in the State courts"; and, in view of the holding of this court in the case of St. Louis, I. M. & S. R. Co. vs. McWhirter, *supra*, as also the other cases cited, neither can there be a doubt that the questions so precisely stated present a claim of a right or immunity under the statutes of the United States.

## II.

In view, therefore, of this state of the record, we pass to a consideration of the second essential element of the jurisdiction of this court, which is included, as we understand the motion of defendant in error, in the second proposition urged in support of the motion, *i. e.*, that the rights asserted and immunities claimed as before stated, are so wanting in foundation and substance as to be devoid of any merit and frivolous and not made in good faith.

In opposition to this claim of the defendant in error, we desire to invite the court's attention to a consideration of the propositions urged by plaintiff in error in support of its contention in the State courts that the claims asserted and immunities claimed should properly be decided in favor of plaintiff in error.

*First:* The first proposition asserted in support of this contention was that plaintiff's intestate was shown by the pleadings and evidence to be an independent contractor and not an employee of plaintiff in error (defendant below), engaged in interstate commerce and, therefore, not within the terms of the Federal Employers' Liability Act (35 Stat., 65).

Since the amended petition, upon which this case was tried, by its express allegations was based upon the Federal Liability Act of April 22, 1908 (35 Stat., 65), as has been frequently held and is now well established, before the defendant in error (plaintiff below) was entitled to a recovery he must have borne the burden of proving by competent evidence,

(1) That the plaintiff in error (defendant below) was, at the time of the injury, engaged in interstate commerce.

North Carolina R. Co. vs. Zachary, 232 U. S., 248;

St. Louis, I. M. & S. R. Co. vs. Seal, 229 U. S., 156.

(2) That plaintiff's (defendant in error here) intestate was an employee of the defendant, and as such engaged in interstate commerce at the time of sustaining the injuries alleged.

North Carolina R. Co. vs. Zachary, *supra*;

St. Louis, etc., R. Co. vs. Seal, *supra*;

Robinson vs. Baltimore & Ohio R. Co., 237 U. S., 84;

Illinois Central R. Co. vs. Behrens, 233 U. S., 473.

(3) That the death of his intestate was caused by the negligence of the plaintiff in error (defendant below), its agents or employees.

North Carolina R. Co. vs. Zachary, 232 U. S., 248;

Seaboard Air Line vs. Horton, 233 U. S., 492.

Plaintiff in error (defendant below), by its answer, admitted that it was a railroad corporation engaged in interstate commerce, and therefore this question need not now be considered.

It is, however, insisted that defendant in error (plaintiff below) failed in his proof that his intestate was an employee of the defendant engaged in interstate commerce at the time of the injury, first, because, under the pleadings in this case and the evi-

dence adduced, it is clearly shown that his intestate was an independent contractor; and, second, because, under the evidence in this case, it was conclusively shown that his intestate, at the time of the injury alleged to have resulted in his death, was not engaged in any service for plaintiff in error.

Attached to the amended petition upon which the case was tried are two contracts under which it is alleged that the intestate of defendant in error was engaged in the service of plaintiff in error. The first of the contracts, Exhibit "A" covered the unloading of coal into the chutes of plaintiff in error at Enid, Oklahoma, as well as the unloading of wood, cinders and sand; the second of these contracts, Exhibit "B," covered the cooping of cars of plaintiff in error for grain. However, since it was neither shown nor seriously claimed that the decedent was performing any of the duties required by the cooping contract at the time he sustained the injuries which resulted in his death, this contract becomes immaterial and therefore may be eliminated from consideration in connection with this phase of the argument. Some reference is made in the brief of argument of defendant in error to the fact that at times the decedent was employed as a laborer in transferring freight, and as such carried on the regular payrolls of the plaintiff in error. The evidence will demonstrate without contradiction, as shown on page 174 of the appendix of the brief of argument of defendant in error that at the time the decedent sustained the injuries from which he died he was not employed as a



laborer in the transfer of freight, and consequently his employment as an extra laborer at intervals is also immaterial and may likewise be eliminated from consideration in connection with this phase of the argument.

The contract for the unloading of coal at Enid, Oklahoma, was in writing. A review of it will demonstrate that its terms were clear and unambiguous. By it the decedent, as a contractor, agreed to furnish all the labor required and necessary to handle the coal, wood, cinders and sand in the manner specified in the contract, and the defendant agreed to pay him a certain stipulated price per unit, that is to say, per ton of coal, per cord of wood, etc., for his work. The details under which the decedent undertook this work are set forth fully and explicitly in the contract itself, and, in addition thereto, by paragraph nine, it is stipulated:

“It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.”

And by Section 12 of the contract, it is made to inure to the benefit of the legal successors and assigns of each party. By the contract the decedent undertook to furnish all labor necessary to perform the work therein specified. Under the evidence it is shown that he had in his employ for the purpose of

performing the stipulations of the contract on his part other men, the number varying according to the amount of coal, wood, cinders and sand handled.

An independent contractor has been defined as "one who contracts to do a specified piece of work, furnishing his own assistants, and executing the work entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done without being subject to the orders of the latter in respect to the details of the work." *Whitney & Sterritt vs. O'Rourke* (Ill.), 50 N. E., 242.

Or as is said by the Supreme Court of the State of Oklahoma in the case of *C., R. I. & P. R. Co. vs. Bennett*, 36 Okla., 358; 128 Pac., 705: "Among the definitions selected and approved in 4 Words and Phrases, 3542, we find the following: An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the results of his work." (Citing cases.) Or, in other words, "the test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under the contract of employment, taking into account the circumstances and situation of the parties and the work, to so control and direct him in the work."

A review of the terms of the contracts involved in this case will disclose no such right on the part of plaintiff in error. As stated, the decedent, under the

contract, agreed to furnish the men necessary to perform the work to be done. It was entirely within his control whether he performed the duties personally or by agents. He had, under the contract, entire control of the men and of the manner of performing the work contracted to be done. The contract expressly denominates him an original contractor. The extent of the authority under the terms of the contract on the part of plaintiff in error was to terminate the same in the event it was not performed to the satisfaction of its officials, and, while defendant in error, in his brief of argument in support of his motion, urges this provision of the contract as showing the relation of employer and employee, or master and servant, we can not agree that such is a correct construction. It seems to us to demonstrate the lack of control or authority on the part of plaintiff in error over the decedent, or his agents, in the performance of the work contracted. If the work was not satisfactorily done, the contract under its terms might be terminated, but nowhere is there a provision made for the giving of directions as to any change in the men or means employed in the prosecution of the work contracted. It is, therefore, submitted that this provision of the contract tends to support the contention of plaintiff in error that the decedent was, as a matter of fact, an independent contractor.

By the language of the Federal Employers' Liability Act, there is created a liability to the employees of the common carrier by railroad, and not to others, and the defendant in error was not entitled to the benefit of the provisions of the act unless his intestate

was "employed by the railroad company within the meaning of the act." The inquiry then is whether the decedent came within the statutory description, "that is, whether upon the facts disclosed in the record it can be said that within the sense of the act the decedent was an employee of the railroad company, or whether he is not to be regarded as outside that description." As is said by this court in the case of *Robinson vs. Baltimore & Ohio R. Co.*, *supra*, "We are of the opinion that Congress used the words 'employer' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."

The distinction between an employee and an independent contractor is well defined. The rights of the one are very different from the rights of the other. An employee is subject at all times to the directions of his employer in regard to the method by which the work is performed, as well as in all other details, and may be dismissed from service at the will of the employer; while, in the case of an independent contractor, the means which he employs, the method which he pursues, the detail which he follows, the direction of his assistants both as to time and method of work and termination of their employment, are all matters solely within his control, except as may be limited by the terms of the contract under which he undertakes the work.

The distinction is clearly drawn by the decision of this court in the case of *Singer Manufacturing Co. vs. Rahn*, 132 U. S., 513, 33 L. Ed., 440, wherein it is said:

“The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, *not only that it shall be done, but how it shall be done.*”

To the same effect is *Railroad Company vs. Hanning*, 82 U. S., 649, at p. 656, 21 L. Ed., 223.

In the case of *Atchison, T. & S. F. R. Co. vs. Dickens*, 103 S. W., 753, the Court of Appeals of Indian Territory had under consideration a contract practically identical with the one involved in this case, and held, as a matter of law, that the contract disclosed the relation of independent contract on the part of the person situated similarly to the decedent in this case. The opinion of the court in this respect is supported by a vast array of eminent authority.

Viewed in the light of these authorities, some of which are decisions of this court, the contract here involved which is in writing, shows that the defendant retained no control over the subject of the contract except as to the results to be accomplished. The decedent was left free to employ whom he chose and as many men as he chose to perform the work. The contract was purely an impersonal one, enuring, as before pointed out, to the benefit of the decedent, his successors and assigns until terminated as therein prescribed. In other words, the defendant, by the expressed terms of the contract, relinquished control of the work, its sole right being to see that the results sought to be obtained by the contract was

accomplished. It is therefore insisted that plaintiff's intestate is clearly shown to have been an independent contractor, and not an employee of the defendant. In this connection, we may call to the court's attention the fact that the evidence discloses beyond any doubt that, at the time of the injury, the decedent was not engaged in the transfer of freight from car to car, nor can it be claimed under the record that he was in any wise engaged in the service of the defendant, unless it be by virtue of the terms of his contract for the handling of coal. Being, then, an independent contractor and not an employee, it is contended that he was not included within the terms of the Federal Employers' Liability Act, upon which this action was grounded. The title to that act (35 Stat., 65), reads: "An Act relating to the liability of Common Carriers by Railroad to their *Employees in certain Cases*." And, in the body of the act the classes of persons affected thereby are enumerated with care and precision: "That every common carrier by a railroad \* \* \* shall be liable in damages to any person suffering injury *when he is employed by such common carrier in such commerce*, or in case of death of *such employee* to his widow or her personal representatives," *et cetera*.

As is said by this court in the case of Illinois Central R. Co. vs. Behrens, *supra*:

"Considering the status of the railroad as a highway for both interstate and intrastate com-

merce, the interdependence of the two classes of traffic in point of movement and safety, and practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carriers for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. *Baltimore & Ohio Railroad Co. vs. Interstate Commerce Commission*, 221 U. S., 612, 618; *Southern Railway Co. vs. United States*, 222 U. S., 20, 26; *Mondou vs. New York, New Haven & Hartford Railroad Company*, 223 U. S., 1; *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S., 194, 213; *Minnesota Rate Cases*, 230 U. S., 352, 432. The decision in *Employers' Liability Cases*, 207 U. S., 463, is not to the contrary, for the act of June 11, 1906, c. 3073, 34 Stat., 232, there pronounced invalid attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee, even though his employment had no connection whatever with interstate commerce.

"Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several States \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,

or, in case of the death of such employee, to his or her personal representative \* \* \* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the *employee* is engaged is a part of interstate commerce. The Act was so construed in *Pedersen vs. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce.'

It is suggested that this construction affords some efficacy to the decision of this court in the case of *Howard vs. Illinois Central R. Co.*, 207 U. S., 463.

In the case of *Robinson vs. Baltimore & Ohio R. Co.*, *supra*, the court, having under consideration the application of the Federal Employers' Liability Act to a porter in the service of the Pullman Company under the terms of a contract between that company and the defendant, held, that the plaintiff was not an employee within the sense of the act and that the provisions of the contract referred to were binding, notwithstanding the terms of the act.



In the case of *M., K. & T. R. Co. vs. West*, 232 U. S., 682, this court had under consideration the question whether a messenger of an express company handling express upon interstate trains of the defendant and performing certain duties for the latter under the terms of a contract between the express company and the defendant was an employee within the terms of the Federal Liability Act, and held, that under the record in that case the plaintiff was not such an employee.

In an action based upon the statute of the State of Alabama for the wrongful death of a coal digger working as an assistant of an independent contractor in the mines of the defendant, the Supreme Court of that State held, that the action itself was based upon the existence of the relation of master and servant and that existence, not having been disclosed, no recovery could be sustained. *Harris vs. McNamara*, 97 Ala., 101; 12 Sou., 103.

The English courts have had frequent occasion to consider the relation of the parties under their Workmen's Compensation Act, and it has been frequently held that one who works as an independent contractor is not entitled to a recovery under that Act. In *Simmons vs. Faulds* (1901), 17 Times L. R. (C. A.), 352, the contractor for a lump sum furnishing labor and tools, but not supplying any materials, was held not to be within the English Workmen's Compensation Act of 1897. In *Hayden vs. Dick*, 40 Scott, L. R. A., 95, a laborer who, with several others, entered into a contract with a quarryman to remove the surface earth from one place to a new part of the

quarry at so much per cubic foot, having full control of the work, and who was not tied down to hours, was held to be an independent contractor, and his wife not entitled to compensation for injuries which he received resulting in his death. To the same effect are these cases of *Vanplew vs. Parkgate Company* (1903), 1 K. B., 851, 872, 19 Times L. R., 421, and *Stuart vs. Evans* (1883), 49 L. T., N. S., 138, 31 Weekly Reports, 706.

In *McElroy vs. Anstead Engineering Co.*, 24 Vic. L. Rep., 953, it was laid down that under the Employers' and Mechanics' Act of Victoria, that the employer is not liable to persons entering into a contract which can be performed by deputies.

Furthermore, there are other acts analogous to the one under consideration, particularly those of Ontario and N. S. Wales, whereby the intention of the legislature to include independent contractors is expressly shown, which emphasize the omission of such provision in the act under consideration.

By analogy, we may refer to the construction placed upon other statutes. It has been repeatedly held that preferences enuring to employees by statute do not include independent contractors.

In the case of *J. E. Vane vs. R. S. Newcombe et al.*, 132 U. S., 220, 33 L. Ed., 310, this Court was called upon to decide whether or not a person who, while doing certain work for a corporation, but under the corporation's control, only as to the results, and not the method of doing the work, was or was not an employee of the corporation. Justice Blatchford, after stat-

ing the facts, says: \* \* \* "Vane must have been a servant, bound in some degree at least to the duties of a servant, and not, as he was, 'a mere contractor bound only to produce or cause to be produced a certain result—a result of labor to be sure, but free to dispose of his own time, and personal efforts according to his pleasure without responsibility to the other party.' " |

Statutes making individual stockholders liable for labor debts have been held to exclude independent contractors, although enuring to "mechanics, workmen and laborers."

In the case of *Taylor vs. Manwaring* (Mich.) 12 N. W., 28, the plaintiff contracted to excavate plaster rock at 60c per ton and to be paid therefor at the end of each month. The plaintiff under this state of facts was trying to hold the individual stockholders liable for the payment of an amount due him under this contract. The Michigan constitution made individual stockholders liable to their employees for labor done. Justice Campbell in holding the plaintiff was an independent contractor says: "It was neither more nor less than farming out the chief quarrying operations of the company to a stranger. \* \* \* His pay was received not for the amount of labor done, but for the amount of stone delivered at the proper places, provided for, and so long as he made his delivery and kept his refuse disposed of the corporation had no voice in his proceedings." |

In *Billingsly vs. Board of Commissioners*, 5 Kans., 435, 49 Pac., 329, a statute of that State regulating

the hours of labor of employees was held not applicable to an independent contractor.

In *Clark vs. Renninger*, 89 Md., 66, 42 Atl., 928, it was held, that the plaintiff was a contractor and not an employee within the terms of an act of that State providing for the appointment of receivers for any persons or corporations engaged in manufacturing who failed to pay "persons in their employ."

In *Fortier et al. vs. Dalgardo & Co.*, 122 Fed., 604, it was held that an independent contractor having a contract with a sugar refinery, to weigh and ship sugar at an agreed price per ton were not "workmen or laborers" whose wages had a preference under the laws of Louisiana.

In *Monroe vs. Fred T. Ley & Co.*, 156 Fed., 468, it was held that the defendant having contracted with another for repairing and rebuilding certain electric lines, was not liable under the statutes of Massachusetts to an employee of such contractor. †

The citation of authorities making a distinction between employees and independent contractors might be prolonged indefinitely, but surely in view of the foregoing authorities, as well as in logic, this Court must conclude that the Federal Employers' Liability Act upon which this action was grounded is shown to have been inapplicable, by the petition of the defendant in error as well as the evidence, and such being the case it is well settled that he was not entitled to a recovery.

It is, therefore, respectfully submitted that the error of the court in denying the rights asserted or

immunities claimed, in view of the argument just hereinbefore made and authorities cited, operated to the substantial prejudice of plaintiff in error, and further, that such rights or immunities, so asserted and claimed, were of substance and not frivolously made.

#### SECOND.

The second proposition asserted in support of the contention of plaintiff in error is:

“That plaintiff’s intestate, on account of whose death this action was instituted, at the time of receiving the injuries from which he died, was engaged in the performance of a contract between himself and a private industry, and not in the employment of the defendant.”

And, in support thereof, we call to the Court’s attention, the fact that the evidence as disclosed by the record is full of references to certain other contracts under which the decedent performed labor for the elevator company, the ice company and others, and further it is beyond dispute that, immediately prior to receiving the injuries from which he died, the decedent had been engaged in the loading of cars of coal for the Enid Mill & Elevator Company under a contract with that company—a matter most assuredly foreign to any service with the railroad company. A reference to the blue print in the record will show that the location of the car into which he was loading coal under his contract with the mill company was at the east side of the freight yards of plaintiff in error

at Enid, and likewise it is shown that the coal chutes of plaintiff in error are located on the west side of these yards one-half mile south of the freight house, which is also located on the west side of the yards. It is nowhere shown in the record, either directly or inferentially, that the presence of the decedent on the east side of the yards of plaintiff in error was occasioned by any duty which he owed to it under his contracts, or otherwise. On the contrary, it is clearly shown that his presence on that side of the yards, which was away from his home, was brought about by reason of the performance of a contract between him and the Enid Mill & Elevator Company—a matter utterly foreign to any service for the defendant, either in interstate commerce or otherwise. So that we insist it can not be said, in view of this evidence, which stands uncontradicted, that the decedent's presence at the place of the accident when he was leaving the place where he had performed his private business was occasioned by any duty which he owed to plaintiff in error. The only reasonable deduction to be drawn from all of the evidence is, that his presence at the point of the accident was occasioned, not by his service to the plaintiff in error, but by his performance of a contract with a third person, and, this being true, he was not engaged in interstate commerce as an employee of plaintiff in error, but, on the contrary, was engaged in his own private business. That decedent was not on a mission to turn in tickets for the coal chutes of plaintiff in error is conclusively shown by the fact that there were none on his person and the

further fact that the tickets were taken from the box at the coal chutes after his death as is disclosed by the evidence of the witness Wallace, printed at page 101 of Appendix "A" to the motion of defendant in error.

The record fails to disclose any competent evidence to show that decedent was in anywise engaged in the performance of any duty owing to the plaintiff in error. The trial court did admit evidence after the case was closed on a purported conversation alleged to have occurred between the deceased and one Hutchinson some ten or fifteen minutes prior to his death, but clearly this evidence was incompetent, surely it was not a part of the *res gestae*, it was not of statements made contemporaneously with the accident and any number of things may have intervened from the time of the conversation to the time of the accident to have caused the decedent to change his purpose, even if it ever was expressed. From this evidence the inference is justified that the decedent was on his way either to the passenger station or to his own dwelling house, in neither of which instances is there shown a duty owing by the decedent to the plaintiff in error. Neither his purpose or cause for crossing the yards of plaintiff in error at the particular time is affirmatively shown by the evidence in the record, nor was the fact that he was engaged in interstate commerce, as an employee of plaintiff in error, proven by competent evidence, and, therefore, it is insisted that one of the essential elements of a right of action under statute is lacking.

The evidence of the witness Hutchinson was finally admitted on the theory that defendant in error had called for a portion of the conversation, but a reference to the record will disclose that such was not the case. The witness was asked by counsel what transpired immediately after the decedent came from the cinder pile; the answer of the witness was voluntary. The plaintiff in error, therefore, did not at any time call for any part of the conversation between decedent and the witness, and in view thereof the court's conclusion and the admission of this testimony constituted error.

Some effort was made by counsel for defendant in error on the trial to show that, by the performance of the contracts between the decedent and the various industries, he thereby released cars to the railroad company which might be devoted to the transportation of interstate freight. It is clearly shown from the evidence in the record, however, that plaintiff's intestate had no duty to perform for the railroad company in this respect, but that his connection with the unloading of cars for the industries was a matter of private contract, and it occurs to us that this contention of defendant in error is so palpably wrong as to need no argument with respect thereto.

It is not every service rendered to a railroad company which brings one within the terms of the act, as is demonstrated by the decision of this Court in the case of *Illinois Central R. Co. vs. Behrens*, *supra*.

The fact of a general employment by a railroad company engaged in interstate commerce does not



bring an employee within the terms of the act unless he is, at the time of the injury, engaged in such commerce. This is one of the conditions precedent to the right of recovery under the act and, therefore, to the right of recovery on the part of the defendant in error in this case, and, this being true, it was incumbent upon defendant in error to establish that his intestate was not only an employee of the defendant, but at the instant of the accident engaged in interstate commerce. It is earnestly insisted that upon the whole record it is shown that defendant in error failed in his proof in this respect and, for this reason, it is respectfully submitted that the error of the State courts in denying the rights and immunities asserted, as enumerated, operated to the substantial prejudice of the plaintiff in error, and that such rights and immunities were of substance and not frivolously made.

### THIRD.

The third proposition asserted in support of the contention of plaintiff in error is:

“That there was no sufficient evidence of negligence on the part of plaintiff in error, its agents or employees, proximately causing or contributing to the injuries sustained by the decedent, and that therefore there was a failure of evidence to sustain the action under the terms of the Federal Employer’s Liability Act.”

And, in support of this contention, we call to the Court’s attention the fact that by the amended peti-

tion, upon which this case was tried, the defendant in error (plaintiff below) set forth nineteen separate averments or negligence. The specification of so many grounds of negligence necessitated the taking of a great volume of testimony, and in view thereof we deem it necessary, in order to aid the Court in reaching a determination of the questions presented, to call to its attention those allegations relied upon by the defendant in error (plaintiff below) in his petition upon which no sufficient evidence was introduced to justify the submission thereof to the jury. A review of the instructions of the trial Court given to the jury will disclose that every specification of negligence contained in plaintiff's petition was eliminated from the issues submitted, except sub-divisions "i" and "o" of paragraph 10 thereof, and it is to these two specifications that we direct the argument in support of the contention that no sufficient evidence was introduced to show negligence on the part of plaintiff in error, or its employees, and that, therefore, its demurrer to the evidence of defendant in error and its motion for a directed verdict in its favor should have been sustained.

Subdivision "i" of paragraph 10 charges that plaintiff in error (defendant below), its servants, agents and employees, were negligent "when seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger." The evidence disclosed that the deceased

when first observed was walking between tracks two and three in the yards of defendant at Enid, in a place of safety; that he turned to the northwest and entered on track two from fifteen to fifty feet in advance of the first car of the train; that as he turned and went upon the track the brakeman, at the end of the car, used all the means at hand to warn him, but without avail.

It is shown by the blue print in the record, as well as other evidence, that there was no crossing or public pathway near the point of this accident; that the bell on the engine was ringing is undisputed; that there was no necessity for the sounding of the whistle of the engine is clearly demonstrated; that the employees on the engine did all in their power to warn decedent after he stepped from a place of safety into a place of peril is conclusively established by the record. There was no evidence introduced by the plaintiff contradicting these facts. That there was no duty owing to the plaintiff so long as he was in a place of safety, is so palpably plain as to need but a statement thereof for its demonstration, and that when he came in a place of danger every means at hand to warn him were used is clearly established by the record.

The decedent is shown to have been long familiar with the yards of the defendant at Enid and with its method of switching there. It is shown by the record that he was thoroughly aware of the fact that trains would probably pass in every direction at any time. This being true, no warning was due to him when he

was in a place of safety. As is said in the case of *C. R. I. & P. Ry. Co. vs. McIntire*, 29 Okla., 803.

In *Crowe, Adm., vs. N. Y. C. & H. R. R. Co.*, 70 Hun., 23 N. Y. Supp., 1100, it is said:

“Great care and precaution are required on the part of railroad companies when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies’ yards, where cars are being distributed and trains made up. The employees about such yards understood the situation; they know the manner of doing business therein, that cars frequently pass along without notice of their approach, and they assume the risks incident to the business as thus conducted.”

Furthermore, this allegation is based upon the alleged failure of the employees of the plaintiff in error to warn decedent of the approach of the train before he turned to enter on the track and when he was in a place of safety, not as he turned to go upon the track and became in a perilous position, which is indeed the very foundation of the rule requiring a warning at all. The existence of a position of peril known to another in time to avoid an injury imposes a duty to warn, for the breach of which a recovery may be had, but where the person is in a safe place before he becomes in a perilous position, another observing him is entitled to the presumption that he will remain in such a safe place and no warning is by law required. *Clark vs. St. L. & S. F. Ry. Co.*, 24

Okla., 764, *Oklahoma City Railroad Co. vs. Barkett*, 30 Okla., 28.

*St. Louis, I. M. & S. R. Co. vs. Gibson*, 150 Pac., 465, not yet officially reported.

Defendant in error in his brief of argument makes reference to the testimony of the witness Reems, printed at pages 224 to 227 of the appendix attached thereto, but fails to call the attention of the Court to the statement of the witness that, at the time the deceased passed from his sight the witness did not know where he went, but thought he had stopped in the clear between the cars on the other track; that he never knew the train had struck the decedent until one of the brakemen came to the engine and told him.

Under the evidence disclosed by the record, in the light of the authorities cited, the allegations of subdivision "i" of paragraph 10 of the amended petition were not sustained and for this reason we respectfully submit that the error of the State Courts in denying the rights and immunities asserted, as enumerated, operated to the substantial prejudice of the plaintiff in error and that such rights and immunities were not frivolously made.

The allegations contained in sub-division "o" of paragraph 10 are as follows:

"The engineer was guilty of negligence in running his train at a high rate of speed and in not using the train power brakes by which he might have controlled its speed or have stopped it when signalled so to do. He was guilty of negligence in running his train in excess of the speed established by ordinance of the city of Enid."

The first part of this allegation must be considered in the light of other allegations contained in the petition relative to the violation of the Safety Appliance Act of March 2, 1903, by which, as contended by the defendant in error (plaintiff below), the engineer was required to use and operate the train power brakes on his train. This contention was submitted to the jury by instructions numbered ten, sixteen, seventeen and eighteen of the Court, and is hereinafter discussed in connection with the fourth and fifth propositions urged in support of the contention of plaintiff in error.

Aside from the erroneous conception of that statute, as will be demonstrated, we think, by the argument respecting the error of the Court in the giving of those instructions, this Court will have observed from its review of the record that there is not a particle of evidence showing that the engineer failed to use his brakes, but on the contrary he is shown to have used the brakes promptly when signalled to do so.

The only possible inference to the contrary might arise from a misconception of the testimony of the witness Rawlins introduced by the defendant in error as an expert engineer and who testified that with a train moving at ten miles an hour it could have been stopped within sixty feet when, as a matter of fact, it was not stopped under one hundred and sixty feet. His evidence, however, when taken as a whole, shows that this conclusion was but a measure of the distance required to stop a train from the moment the brakes were applied to the instant the train stopped, and did

not take into consideration the time which would elapse while the engineer was receiving the signal, grasping the brake valve and making the application of air. So that there is no evidence in this record, nor any reasonable inference to be drawn therefrom, justifying the claim that the engineer failed to use his brakes after signaled to do so.

It is not even contended that the engineer ever saw the deceased until after the accident, and this charge, if sustained, must be based upon the failure by the engineer to use the brakes after receiving a signal to stop.

The other phase of this allegation of negligence concerns excessive speed, both generally and as declared by the city ordinance, and a consideration thereof in the light of the contention now raised necessitates an examination of the evidence by which it will be seen that the most favorable estimate of the distance of deceased in advance of the approaching train when he entered the track is seventy-five feet, and the most favorable testimony of the distance required to make the stop at ten miles an hour, which was the requirement of the city ordinance, was sixty feet after the application of air, with an additional allowance in time or distance for transmitting the signal and executing the application; so that, even viewing the evidence from the most favorable standpoint to the defendant in error, it is demonstrated that the rate of speed of the train, even if proven to be excessive, which is not admitted, was not the proximate cause of the injury—or, from another view-

point, there was no evidence, or legitimate inference, to be drawn from the testimony tending to show that the running of the train in excess of the limit prescribed by the ordinance produced the injury nor that such a result might have been reasonably anticipated.

This was the burden which the defendant in error bore, and until discharged no causal connection between a breach of duty and the injury was shown, and no recovery could be had.

In the case of *Berry vs. Sugar Notch Borough* (Penn.), 43 Atl., 240, the court considering a claim by the plaintiff that the excessive speed at which a car was running brought it to a point at the instant a tree was falling and therefore became the proximate cause of the injury, and in connection therewith said:

“Nor can it be said that the speed was the cause of the accident, or contributed to it. It might have been otherwise if the tree had fallen before the car reached it, for in that case a high rate of speed might have rendered it impossible for the plaintiff to avoid a collision which he either foresaw or should have foreseen. Even in that case the ground for denying him the right to recover would be that he had been guilty of contributory negligence, and not that he had violated a borough ordinance. The testimony, however, shows that the tree fell upon the car as it passed beneath. With this phase of the case in view it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the



accident at the moment when the tree blew down. The argument, while we can not deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted."

In *Stearns vs. Boston & Maine Railroad* (New Ham.), 71 Atl., 21, it was contended by the plaintiff an earlier application of the brakes would have prevented the collision, and the court, disposing of this contention, said:

"The plaintiff appears to suggest in argument that the application of the brakes results in a decrease of speed directly proportionate to the distance traversed. The witness Clark testified that a train running twenty-five miles an hour could be stopped in 300 to 350 feet, if running forty to fifty miles in 1,300 to 1,400 feet, from which it can be argued that the rate at which the speed diminishes increases with the distance traversed; for it would seem to follow that, with the brakes set when the speed was diminished to twenty-five miles an hour, 350 feet more would bring the train to a standstill, and that it would therefore require at least 950 to 1,050 feet to reduce the speed from fifty to twenty-five miles. This may not be so. The action may be just the other way, more effective at first and having a less retarding effect for some reason or other the longer the distance traveled, or the retarding effect may be exactly proportional to the distance. However this may

be, the action of a train under application of the brakes is not a matter of common knowledge. There was no evidence before the jury tending to show that the trainmen could have checked the speed of the train sufficiently to have permitted Stearns to cross in safety. A conclusion that an earlier application of the brakes, at any time after Stearns had created the danger by his negligence would have prevented the injury would have been conjecture founded on no evidence. The question was improperly submitted to the jury because there was no evidence upon which it could be determined in the plaintiff's favor."

In the case of *Western Railway of Alabama vs. Mutch*, 21 L. R. A., page 316, it was held as matter of law that:

"Running a train through a town at a speed in excess of that prescribed by ordinances is not a proximate cause of the death of a boy who is killed in attempting to catch on the train for the purpose of enjoying a free ride through the town, so as to render the company liable therefor."

It is therefore respectfully submitted that for this reason the error of the State courts in denying the rights asserted and immunities claimed operated to the substantial prejudice of the plaintiff in error and that such rights and immunities were not frivolously made.

#### FOURTH.

The fourth and fifth propositions urged in support of the contention of plaintiff in error relate to the error of the trial court in instructing the jury

that the recovery of the defendant in error (plaintiff below) could not be diminished by reason of the negligence of his intestate where injury resulted from a violation of the Safety Appliance Acts, coupled with a construction of the Safety Appliance Acts.

In connection with this proposition we invite the court's attention to the evidence of the witness A. A. Bavington omitted from the appendix to defendant in error's brief of argument but attached hereto as Exhibit "F," and especially to the portion thereof as follows:

"Q. Do you know whether that engine was equipped with air?

A. I do.

Q. Was it?

A. It was.

Q. Do you know whether the brakes, the air on the two cars connected with the engine was coupled on or not at the time of the accident?

A. It was; I went and tested the brakes after the accident happened, which it was my duty to do.

By John C. Moore: If the court please, the petition states it was fully equipped with air brakes, and there is no need of encumbering the record with that.

By W. H. Moore: I beg the court's pardon: I didn't know that."

In view of this evidence and admission on the part of the defendant in error, we now invite the court's attention to paragraph 17 of the instructions given to the jury, which was in language as follows:

Instruction No. 17 is as follows:

"You are instructed as a matter of law, that in any train engaged in interstate commerce operated by any common carrier by railroad, that not less than eighty-five per centum of the cars in such train shall have their cars equipped with train power brakes, and in running such train they shall have their train power brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in such train, which are associated together with said eighty-five per centum shall have their brakes so used and operated; that this is a matter of statute by the United States, and the court instructs the jury that to operate a train which is required to be so equipped, and which is so equipped, without using or operating such power train brakes is in violation of the statute of the United States."

This instruction is based upon the theory of the defendant in error as disclosed by the amended petition that the failure of an engineer to use the train power brakes in time to have avoided the accident constituted a violation of the Federal Safety Appliance Act as amended March 2, 1903, 32 Statutes, 943, Section 2, of which is as follows:

"Sec. 2. That, whenever, as provided by said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive

drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

The contention being based upon the words: "That, whenever, as provided by said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated." This does not say that the brakes shall be used efficiently, it merely denominates what agency shall have control of the operation thereof. The purpose of the original statute of March 22, 1893, 27 Stat., 531, was to place the control of the train in the engineer, without "requiring brakemen to use the common handbrakes."

The Act of 1903, Section 2 of which is above quoted, is but an amendment of the former Act and more definitely discloses the purpose of Congress to

designate the person on the train who should operate the train power brakes thereon. We have searched diligently to find a case disclosing a similar contention to that urged by the defendant in error, but have been utterly unable to do so. It seems plain on the face of the statute that Congress had never contemplated the imposition of an absolute liability on the railroad for the failure of an engineer to at all times and under all circumstances, whether known to him or not, operate and use the brakes efficiently; if such were true, to demonstrate the absurdity of the contention, there never could be a collision between a railroad train and any other object, without an absolute liability on the part of the railroad company, for if the brakes are used efficiently, no collision will have occurred. In all cases during the progress of the train prior to a collision, it could have been stopped by the use of the brakes, although in some circumstances, if such a rigid rule were enforced, it can readily be seen that the railroad company would be held absolutely liable for the failure of the engineer to use his brakes and therefore avoid a collision, although he never knew and could not have known of the person or object with whom he collided in time to have stopped his train. Most assuredly this court will not accept any such construction, especially in view of the fact that subsequent legislation (36 Stat., 298), has, under some circumstances, loosened the rigidity of the rule requiring trains to be equipped with air brakes to a given percentage to the total number of cars thereon. The ob-

ject sought by the Safety Appliance legislation, was to have trains equipped with the appliance prescribed, in proper working condition. Congress never intended to impose upon a railroad company any such absolute duty as is sought here to be imposed upon it. Therefore, Instruction No. 17 is erroneous. The same objection applies to instruction No. 10, which tells the jury that "if the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same and that such failure contributed to the injury and killing, then you shall not hold said Turner as being guilty of any contributory negligence, and shall not diminish the damages from that cause."

Likewise, Instruction No. 16 contains the same error as does Instruction 18, each of which operated to the material and substantial prejudice of the plaintiff in error in that the jury were told that although they might find that the decedent was negligent, they could not take into consideration in assessing the damages to be awarded to his beneficiaries the fact of his contributory negligence because under the Federal Employers' Liability Act, such negligence was expressly excluded from consideration when injury resulted from a violation of the Safety Appliance Acts.

Can it be said, in view of the record, that the jury would have found the amount of damages awarded, if they had been permitted to consider the contributory negligence of Turner? By the instruction, this

permission was withdrawn because of an erroneous conception of the Safety Appliance Act on the part of the trial court.

The language of the Federal Employers' Liability Act imposes a liability for the negligence of the railroad, its agents and servants. This liability, as has been repeatedly held by this court, is that existing at common law, except that the same is modified by the third section of the act, in that the contributory negligence of the injured employee may not be pleaded in bar of the action but must be considered by the jury in diminution of the amount of the recovery. However, this section of the act renders the contributory negligence of the injured party none the less a material issue in a cause arising under the terms of the act, and, as held by this court in the case of *Norfolk & Western vs. Ernest*, 229 U. S., 114; *Seaboard Air Line vs. Horton*, 233 U. S., 492, such issues should be submitted to the jury under proper instructions. That such was not done in this case seems to us beyond question. Indeed, in the brief of argument of defendant in error this seems to be practically admitted and the effect of the error is sought to be avoided by reference to paragraph 40 of the instructions given to the jury wherein it is stated that there could be no recovery upon the plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the statutes of the United States, as alleged in subdivision "p" of the tenth paragraph of the petition. But we respectfully submit that the giving of this instruction did not cure the error caused by the giving of instruc-



tions numbered ten, sixteen, seventeen and eighteen, for the reason that the court admitted to the jury the allegation of negligence contained in subdivision "o" of paragraph 10, to the effect that the engineer was negligent in running his train at a high rate of speed, and in not using train power brakes by which he might have controlled its speed or have stopped it when signalled so to do. This allegation, when taken in connection with the other allegations of the petition, could only have had reference to the contention urged by defendant in error that the failure to use the train power brakes constituted a violation of the Safety Appliance Acts referred to.

It is therefore respectfully submitted that the error of the court in giving to the jury paragraphs 10, 16, 17 and 18 of the instructions given and thereby the denial by the State courts of the rights and immunities asserted and claimed in respect thereto operated to the substantial prejudice of plaintiff in error, and that such rights and immunities were not frivolously made.

### III.

We pass now to a consideration of the third proposition presented by the motion to dismiss, that is to say, that the order of the United States District Court remanding the cause to the State court was conclusive of the questions heretofore presented.

In connection with this proposition, it may be said that, within the time provided by law, plaintiff in error (defendant below), filed in the said court its petition and bond for the removal of said cause to

the United States District Court for the Western District of Oklahoma. This petition for removal was based upon a diversity of citizenship between the parties and was accompanied by an allegation that the plaintiff's intestate, at the time of sustaining the injuries from which he died was not an employee of petitioner engaged in commerce between the States or engaged in interstate commerce. The cause was, by order of the District Court of Garfield County, removed to the United States District Court for the Western District of Oklahoma, wherein the defendant in error, as plaintiff below, filed a motion to remand the same. On the hearing of this motion, the District Court of the United States, upon the authority of *Woeker vs. National Enameling and Stamping Company*, 204 U. S., 176, permitted the taking of evidence, not upon the merits of the case stated by the plaintiff's petition, but on the question whether or not the allegation contained in the plaintiff's petition, that his intestate was, at the time of receiving the injuries, in the employment of the defendant, engaged in interstate commerce, was, as a matter of fact, but a fraudulent allegation, having for its real purpose the prevention of the exercise of the right of removal, or the invocation of the jurisdiction of the District Court of the United States. There was, of course, involved in the hearing on the motion to remand the sole question of the jurisdiction of the United States District Court, and the court held that, in view of the pleadings, as also the evidence taken, it could not be said that there was no possible theory upon which there could be based the

allegation that plaintiff's intestate was, at the time of receiving the injuries from which he died, an employee of the defendant engaged in interstate commerce, and, on this account, remanded the cause to the State court for trial on the merits.

And since the only question under consideration by the District Court of the United States was one of its own jurisdiction, and further, since the cause was remanded to the State court, not for judgment, but for a trial upon the merits, we take it that it is needless to prolong the argument in order to demonstrate the lack of substance in this proposition of the defendant in error.

Plaintiff in error has asserted the various propositions hereinbefore advanced from the very inception of this cause and has carefully seen that the same, with the rulings of the courts thereon, were preserved of record. We confidently submit that upon a review of the record, the court must inevitably conclude that plaintiff in error has acted in all good faith in the presentation of the rights asserted and immunities claimed throughout the course of this controversy.

It is therefore respectfully submitted that the motion of the defendant in error to dismiss and affirm should be overruled.

Respectfully submitted,

J. G. GAMBLE,

R. J. ROBERTS,

*Attorneys for Plaintiff in Error.*

M. L. BELL,

C. O. BLAKE,

*Of Counsel.*

## EXHIBIT "A."

## PLAINTIFF IN ERROR'S (DEFENDANT BELOW) REQUESTED INSTRUCTIONS.

"Defendant's requested Instruction No. 1:

"The court instructs the jury that under the law and the evidence in the case, its verdict must be for the defendant.

"Offered by defendant, refused by the court and exceptions allowed.

"James W. Steen, Judge.

"Defendant's requested Instruction No. 11:

"The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that, when the deceased was seen to be about to enter on track two, it negligently failed to signal him in some effective manner that he might become aware of approach of said train before entering into a position of danger, as alleged in subdivision I of the tenth paragraph of plaintiff's petition.

"Offered by the defendant, refused by the court and exceptions allowed.

"James W. Steen, Judge.

"Defendant's requested Instruction No. 22:

"The court instructs the jury that under the evidence in this case, the deceased, William L. Turner, at the time of his death, was what is known as an independent contractor, and was not at said time an employee of the defendant engaged in interstate commerce within the meaning of the law, and its verdict must be for the defendant.

"Offered by the defendant, refused by the court, and exceptions allowed.

"James W. Steen, Judge.

"Defendant's requested Instruction No. 17, being Instruction No. 29 of general instructions of court until withdrawn:

"The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the engineer on engine No. 2113 was running his train at a high rate of speed and in not using the train power brakes by which he might have controlled its speed, or have stopped it when signaled to do so, as alleged in subdivision O of the tenth paragraph of plaintiff's petition.

"Withdrawn and excepted to by defendant.

"James W. Steen, Judge.'

## EXHIBIT "B."

## INSTRUCTIONS OF THE COURT.

"Gentlemen of the Jury: You are instructed that this action is brought under and by virtue of an Act of Congress of the United States, commonly called the Employers' Liability Act. The plaintiff in his petition states that he is the administrator of the estate of William L. Turner, deceased, and that he brings the suit for the benefit of the widow and children of the deceased Turner. He sets out their names, ages, and residence, and alleges that said Turner departed this life on the 28th day of July, 1912, at Enid, Garfield County, Oklahoma, at a time when defendant, Chicago, Rock Island & Pacific Railway Company, was a common carrier by railroad between certain States of the United States, and that said Turner was an employee of said defendant Railway Company, and was performing an act of interstate commerce for said company, when through their carelessness, negligence and unlawfulness, without fault or negligence on his part, he was run over and killed by said company in their switch yards in the City of Enid, Garfield County, Oklahoma.

"He sets out with great particularity the situation of the yards, the duties of deceased under the contracts of his employment, the acts he was performing when killed, and the circumstances of negligence on the part of the defendant railway company, and alleges that the same occurred within the corporate limits of the City of Enid, Oklahoma; that the train which killed the said Turner was proceeding within said limits in excess of the speed limits prescribed by ordinance of said city, and that said train was being run

at the time in violation of a statute of the United States, in that the train power brakes with which it was equipped were not used or operated by the engineer from the engine pushing said train, and that all the causes of negligence thus alleged were the proximate and sole causes of the killing of said Turner.

"2. The defendant Railway Company for its answer denies each, all and singular the allegations of the petition of plaintiff except that it admits that it is a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, having its principal office or place of business at the City of Chicago, in Illinois, and having and operating a line of railway into and through the State of Oklahoma and into and through the County of Garfield, therein.

"It expressly denies that the said Turner received his injuries in the manner alleged, and states that if he received injuries which caused his death that such injuries were directly due and proximately caused by the negligence and want of care on the part of said Turner, and that the said injuries to and death of the said Turner were not contributed to or caused by the negligence or want of care on the part of the defendant.

"That for a separate defense it states that if said Turner received the injuries from which he died, as alleged, that he, the said Turner, was guilty of negligence and want of care directly and proximately contributing to his alleged injuries and death in this: That on the afternoon of July 28, 1912, at about the hour of five o'clock, he was walking between the tracks two and three in the yards of the company and was in a place

of safety; that while so walking and being in a place of safety, did fail to exercise ordinary care for his own safety and did step upon track two in the said yards, immediately in front of an advancing and approaching train, by which he was struck and knocked down, sustaining the injuries which resulted in his death, that the said inattention, negligence and want of care on the part of said Turner directly and proximately contributed to his injuries and death.

"3. That plaintiff has filed a reply to the defendant's answer, in which he denies all allegations of negligence on the part of deceased, William L. Turner.

"You are, therefore, instructed that there is no allegation either in the petition, answer or reply, but what is denied, except the admission that the defendant is a railroad corporation of Illinois and Iowa, and has and operates a line of railway into and through Oklahoma and Garfield County. This one admission is the only fact on which no evidence is taken, and will in your deliberations, be taken as absolutely true.

"4. You are instructed that the burden of proof is upon the plaintiff to prove the allegations of the petition by a fair preponderance of the evidence.

"5. By a 'preponderance of the evidence,' as used in these instructions, does not mean the greater number of witnesses alone, but is that evidence which best satisfies and convinces you of its truthfulness.

"6. You are further instructed that the burden is upon the plaintiff, not only to prove defendant's negligence but that he must also prove that such negligence was the cause of his injuries.



"7. You are further instructed that the happening of the accident which caused the death of W. L. Turner raises no presumption of negligence or wrongful act of the defendant.

"8. The court instructs the jury, that before the plaintiff is entitled to recovery in this case he must prove by a preponderance of the evidence that the death of William L. Turner was the direct and proximate result of some one or more of the acts of negligence alleged in plaintiff's petition.

"9. You are instructed that the admission of defendant railway company of having and operating a line of railway into and through the state of Oklahoma, is an admission that it is a common carrier by railroad and engaged in interstate commerce. Now, if you believe from the evidence that the deceased, William L. Turner, was an employe of said defendant company at the time he was killed, and that he was then and there engaged in doing an act of interstate commerce for said company when killed, that he was not guilty of any negligence at that time, and that the negligence of the defendant company was the sole cause of his death, then your verdict should be for the plaintiff. On the other hand, if you believe from the evidence that the defendant company was not guilty of any negligence and that the injury to and death of said Turner was wholly caused by his own negligence, then your verdict should be for the defendant.

"No. 9 given by the court and excepted to by the defendant.

James W. Steen, Judge.

"10. If you believe from the evidence that the deceased William L. Turner, was an employe

of the defendant company, and was in the act of performing a duty of interstate commerce for said company when killed, and you further believe that both he and the said company were guilty of contributory negligence, without which he would not have been killed, then your verdict must be for the plaintiff; but you shall diminish the damages in proportion to the amount of negligence attributable to said Turner. Provided, however, that if you believe from the evidence, that the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same, and that such failure contributed to the injury and killing, then you shall not hold the said Turner as being guilty of any contributory negligence, and shall diminish the damages from that cause.

“No. 10 given by the court and excepted to by the defendant.

James W. Steen, Judge.

“11. Negligence consists in conduct which common experience or with special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen.

“No. 11 given by the court and excepted to by the defendant.

James W. Steen, Judge.

“12. Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence and con-

tributing to the injury as approximate cause thereof, without which the injury would not have occurred.

"No. 12 given by the court and excepted to by the defendant.

James W. Steen, Judge.

"13. The conduct of the deceased, Turner, must be subjected to the same test of reasonable prudence and caution in the exercise of due care and diligence as would be expected of a reasonable prudent and careful person under similar circumstances; so, if he was familiar with the switch yards and their dangers; that he frequently used them at work and labor therein and in crossing and re-crossing them, and knew how to act in so doing to protect himself, and was trained and familiar with railroad signals and knew how to interpret them, and that under the special circumstances if he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted to take some precaution that a prudent man ought to have taken, whereby he lost his life, he was guilty of contributory negligence. He would approach cautiously and carefully, should look and listen, and do everything that a reasonably prudent man would do before he attempted to cross over the track where he was killed; scrutinizing his actings and doings under the light of the then situation, the nature and character of the way he was going, the fact of the difficulty of observation, if any, the time of day and the probability of danger from passing trains, the fact that there were other tracks side by side, that another train on one of these was actually approaching and passing, the noise and confusion and every fact and

circumstance bearing on the case to influence his conduct then and there, under those circumstances and not under any other circumstances and say upon your fair and impartial judgment whether he acted as a reasonable and prudent man should have acted and with the due care and caution demanded by the exigencies of the occasion.

"Given by the court and excepted by the defendant.

James W. Steen, Judge.

"14. (Note: No number 14 instruction was given, perhaps due to mistake in numbering.)

"15. You are instructed that the knowledge of the servant of the railroad company of the danger of accident when apparent, is the knowledge of the company within the meaning of the law, and the acts of the servant under such circumstances are deemed to be the acts of the company itself.

"No. 15 given by the court and excepted to by the defendant.

James W. Steen, Judge.

"16. You are advised that a common carrier by railroad is engaged in interstate commerce when running its trains from one state to another, and that all trains which cross the line between two states are interstate trains and their crews are called train crews, and are engaged in interstate commerce. That this character attached to each of such trains in all parts of its journey until it reaches its final destination. That all such trains are required to be equipped with train power brakes, and that in the running of such trains such train power brakes must be used

and operated and failure so to do is violation of an express statute of the United States That during the progress of such train, if it becomes necessary for it to leave cars at a station, or take on cars, that such operations do not take from it its character of an interstate train nor change its crew from being a train crew. That the duty remains in all parts of its operations to use and operate its train power brakes until it reaches its destination.

"No. 16 given by the court and excepted to by the defendant.

James W. Steen, Judge.

"17. You are instructed as a matter of law, that in any train engaged in interstate commerce operated by any common carrier by railroad, that not less than eighty-five per centum of the cars in such train shall have their cars equipped with train power brakes and in running such train they shall have their train power brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in such train, which are associated together with said eighty-five per centum shall have their brakes so used and operated; that this is a matter of statute by the United States, and the court instructs the jury that to operate a train which is required to be so equipped, and which is so equipped, without using or operating such power train brakes is in violation of the statutes of the United States.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"18. You are instructed that though you may believe from the evidence that Turner was guilty

of contributory negligence at the time he was killed, yet if you believe that the engine and cars which ran over him and killed him were run by the defendant railway company in violation of any statute of the United States, and that such running of said engine and cars in such violation of such statute contributed to the killing of said Turner, you shall then not hold said Turner guilty of contributory negligence, and the damages you shall find, if any, shall not be diminished by you by reason of his contributory negligence.

“Given by the court and excepted to by the defendant.

James W. Steen, Judge.

“19. (Note: No instruction number 19 was given, due to the fact that same was withdrawn by the court after numbering, but before reading to the jury.)

“20. You are instructed that if in any contract, rule, regulation or device whatsoever, it may have been made to appear to you that the purpose and intent of said contract, rule, regulation or device whatsoever, shall be to enable the defendant company to exempt itself from any liability for such injury, that you shall not consider such contract, rule, regulation or device whatsoever, as contained in any contract of employment, but shall consider such portion of such contract as being void and forbidden by law.

“Given by the court and excepted to by the defendant.

James W. Steen, Judge.

“21. The court instructs you that the labor and work of shoveling coal into the pockets of the coal chutes of a railroad company engaged in in-

terstate commerce for use of its engines, a portion of which are engaged in interstate commerce, making reports to the company of the cars unloaded, turning in coal tickets which show the amount of coal taken from the chutes by such engines, and ordering coal set on the chutes in cars for unloading into the pockets, are all acts contributing toward interstate commerce, and that the person doing such things when doing them is engaged in interstate commerce within the meaning of the law. If you believe from the evidence that the deceased, Turner, was going to the freight house of the defendant company, either to turn in his coal tickets or to order coal set on the chutes for unloading, or both, when he was killed, then he was at the time engaged in interstate commerce, unless you find and believe from the evidence that the deceased, William L. Turner, prior to receiving the injuries which caused his death, had gone to the east side of the defendant's yards at Enid upon his own business, and not in the discharge of any duty which he owed the defendant, and that he was killed while crossing the yards, and before he had performed or was performing any duty to defendant, then your verdict should be for the defendant, and the mere fact that before starting to cross the yards he stated that he was going to turn in his coal tickets and order coal for the chutes, would not be sufficient to constitute him an employe of the defendant at the time of his death.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"22. You are instructed that the mortality tables of American experience in expectancy of

life may be considered by you in determining how many years the deceased, William L. Turner, might have lived had he not been killed and such expectancy may be considered by you as an element in measuring damages in this cause; provided, your verdict shall be for the plaintiff; and another element you may consider in measuring such damages is the evidence of his earnings, annually, monthly or weekly, as the same may appear to you. But you are advised that both of these elements will not justify you in finding any sum whatever for the plaintiff, and that before you can do so you must determine from the evidence how much he contributed to the support of each one dependent upon him, or to whose support he contributed, and the sums he contributed, either annually, monthly, weekly or otherwise as it appears to you from the evidence, and the periods of time each should expect the continuation of such sums had he not been killed. From these elements separately you may determine what sums he would have contributed had he not been killed, and the aggregate of such sums may be considered by you in determining the sum of damages suffered by all of the beneficiaries. In determining how long contributions might be expected from him to those dependent upon him you may take into consideration his legal duty to support each of the beneficiaries.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"23. If your verdict is for the plaintiff and you believe that the widow, Ida M. Turner, as a beneficiary, would in the course of nature live longer than the deceased, William L. Turner, would



have lived had he not been killed, then you may consider his expectancy of life as an element of the damages she has suffered; that is an element in the calculation of the damages she has suffered, and you may also consider the annual, monthly or weekly allowances she had been accustomed to receive from him for her own use, and from those you may determine the sum that she has been deprived of and will be deprived of by reason of the same being stopped by his death. You are not to consider her mental anguish, loss of companionship or advice, nor any element of damages but the sums of which she has been deprived, and which she has been accustomed to receive from him.

“Given by the court and excepted to by the defendant.

James W. Steen, Judge.

“24. If your verdict is for the plaintiff, you may consider the age of each child who is named as a beneficiary in this action at the time said William L. Turner was killed, and as an element and measure of damages to each child, you may consider the time to elapse until such child is emancipated from the control of its parents; and as a further element and measure of the damages sustained by each child, you may consider the annual, monthly or weekly allowances appropriated out of his funds and contributed by him to the support of the family, as the evidence may disclose, and from the facts thus obtained by you, you shall determine what damages each of said children have sustained by being deprived of such allowances, and after determining the same, you shall make return, along with your verdict, of such sums separately to each child by name, and also to the widow.

"You are advised by the court that no one entitled to judgment for any sum unless it be shown that the deceased was accustomed to make provision for such one, and that this applies to all persons whomsoever. If any persons' names appear in the suit as beneficiaries, and no such evidence is adduced to show contributions to such persons, you shall make return of the fact that you do not allow any such claimant any sum whatsoever.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"25. If your verdict is for the plaintiff, and you have determined the sum you shall allow to each beneficiary, you may then add the amounts together to make one sum, and may make up your verdict for such total sum and accompany the same with the separate allowances to the beneficiaries by name and return the same into court with your general verdict.

"Forms of verdict suitable to this instruction will be furnished you.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"26. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in starting its engine No. 2113, and the cars attached thereto, backing on track two, while train No. 24 was coming in on the main track, and very near to it, with the tracks running parallel, as alleged in sub-division A of paragraph ten of his petition.

"27. The court instructs the jury that there can be no recovery in this case upon plaintiff's al-

legation that the defendant was negligent in starting and running its engine No. 2113, and the cars attached thereto upon track two, while No. 24 was coming into the yards on the main line, as alleged in sub-division B of paragraph ten of his petition.

"28. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the death of William L. Turner was occasioned by the negligence of the defendant in failing to give the blasts from the whistle prescribed by the rules of the company, as alleged in sub-division C of paragraph ten of his petition.

"29. The court instructs the jury that a verdict against the defendant in this case would not be justified upon plaintiff's allegation that defendant neglected to ring the bell and sound the whistle frequently while backing engine No. 2113, as alleged in sub-division D of paragraph ten of his petition.

"30. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in continuing to back engine No. 2113 with the cars attached thereto, before train No. 24 came to a stop, as alleged in sub-division E of the tenth paragraph of his petition.

"31. The court instructs the jury that it can not find a verdict for the plaintiff in this case upon the allegations that the defendant was negligent in commencing to back engine No. 2113, and continuing to do so at a time that its signals, if given, were likely to be so co-mingled with those of No. 24 and to be incapable of being understood, thus causing confusion in the interpretation and endangering those who might be

near, as alleged in sub-division F of the tenth paragraph of plaintiff's petition.

"32. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the death of William L. Turner was occasioned by the fact that the signals of the moving train were intermingled with those of train No. 24 and were misunderstood, as alleged in sub-division G of the tenth paragraph of the plaintiff's petition.

"33. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in failing to signal the deceased Turner, when said deceased was seen walking between tracks No. 2 and No. 3, to notify him of the presence and approach of the train, as alleged in sub-division H of the tenth paragraph of plaintiff's petition.

"34. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the fireman in the cab with the engineman did not have the engine slowed or stopped when he saw the deceased entering on track two, until he should see that he had safely passed in the clear, as alleged in sub-division J of the tenth paragraph of plaintiff's petition.

"35. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the brakeman on the flat car when he saw the deceased entering on track two, negligently failed to signal the engineer to stop or go slow, until he could see that the deceased was in the clear as alleged in sub-division K of the tenth paragraph of plaintiff's petition.

"36. The court instructs the jury that there can be no recovery in this case upon plaintiff's al-

legation that the defendant was negligent in that the brakeman did not have in his hands any flag or other device for signaling the engineer or fireman as alleged in the sub-division L of the tenth paragraph of plaintiff's petition.

"37. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman upon the flat car which struck deceased, was out of sight of the engineer so that signals could not be seen, if made, as alleged in sub-division M of the tenth paragraph of plaintiff's petition.

"38. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman waited to give the signal until the deceased was in imminent peril and that instead of giving the train signal he gave a loud and piercing yell, which caused Turner to stop and throw himself in a position where he could not escape injury, as alleged in sub-division N of the tenth paragraph of plaintiff's petition. Unless, you believe that the acts of the brakeman were not the acts of an ordinary prudent man, considering the surrounding circumstances as they appear from the evidence.

"Given by the court and excepted to by the defendant.

James W. Steen, Judge.

"39. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the engineer on engine No. 2113 was running his train at a high rate of speed and in not using the train power brakes by which he might have con-

trolled its speed, or have stopped it when signaled to do so, as alleged in sub-division — of the tenth paragraph of plaintiff's petition.

"No. 39 was offered by defendant, and given by the court, but afterwards by the court withdrawn from the jury, to which defendant excepted, as will appear in 'Requested Instructions' and in defendant's motion for a new trial.

"40. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the statute of the United States, as alleged in sub-division P of the tenth paragraph of plaintiff's petition.

"41. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that it ran its train in the switch yards at Enid, without ringing the bell and sounding the whistle, as alleged in sub-division of the tenth paragraph of plaintiff's petition.

"42. The court instructs the jury that the plaintiff can not recover in this case upon his allegation that the defendant was negligent in that the engineer when he found that his brakeman was not in sight, did not stop his train and require the brakeman to keep in sight so that signals might be seen as alleged in sub-division R of the tenth paragraph of plaintiff's petition.

"43. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the train crew, operating engine No. 2113, had abundant opportunity to save the life of the deceased, Turner, but negligently failed to do so, as alleged in sub-division S of the tenth paragraph of plaintiff's petition.

"44. The court instructs the jury that if they find and believe from the evidence in this case that the direct and proximate cause of the death of William L. Turner was his own negligence, inattention or want of ordinary care, that its verdict must be for the defendant.

"45. The court instructs the jury that one, while near or upon a railroad track, is required to exercise due care for his own safety and before placing himself in a position of danger, is required to look and listen for approaching trains, and if he fails to so look or listen and is killed or injured by reason of such failure and without negligence on the part of the railroad company, he is not entitled to recover.

"46. The court instructs the jury that if they find and believe from the evidence that immediately prior to receiving the injury, which caused his death, the deceased, William L. Turner, was walking between tracks Nos. 2 and 3, in the switch yards at Enid, and that without looking or listening for an approaching train, he stepped from a position of safety to one of peril and was killed, then your verdict must be for the defendant, unless you further find that after he reached a position of peril, and such peril was discovered by the employees of the railroad company, said employee failed to use the care and caution that prudent persons would use under the same circumstances to avert the injury.

"47. The court instructs the jury that whether said William L. Turner, deceased, was in the yards of the defendant at the time of his death as an employee or licensee, that by going there he assumed the risk of the perils incident to his position from the proper and customary use and operation of said yards and it was his duty in

order to protect himself from said peril to take such care and precaution as reasonably prudent persons would exercise under the same or similar circumstances.

"48. The court instructs the jury that in determining whether or not the employees of the railroad company were guilty of negligence after the peril of the deceased was discovered, it is your duty to take into consideration the facts and circumstances surrounding them at the time. The opportunity or lack of opportunity for deliberation and the care that is required of them by law is such as reasonably prudent persons would have exercised under the same stress and strain of excitement, if you find the circumstances were such as to produce such excitement.

"49. Any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains, and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening, he is guilty of negligence.

"50. A person approaching, or going upon or near, a railroad track upon which trains are in the habit of running, is bound by law to look and listen, and listen for approaching trains, providing that he has any reason to believe that there may be such approaching; and the fact that he was an employee did not release him from the necessity of exercising reasonable care under the circumstances for his own safety. He had the right to rely wholly upon the railroad company for protection from passing trains or cars.

"51. You are instructed that in this case nine or more jurors concurring may return a verdict for or against either party to the action, but in



case a less number than twelve join in the verdict, it will be necessary for those concurring therein to sign the same; but in case your verdict is unanimous, then it need be signed by your foreman only.

"52. You are the sole and exclusive judges of the facts in the case, the credibility of the witnesses and the weight to be given their testimony. If you find and believe that any witness has sworn falsely to any material fact in the case, you have the right to disregard the whole or any part of such witness' testimony.

"You have heard all the evidence in the case, the instructions of the court, stating the law of the case, and will now listen to the argument of counsel for plaintiff and defendant giving their respective theories of the case, and will give such arguments careful and conscientious consideration insofar as in your judgment they are based on the law and the evidence, at the conclusion of which you will be placed in charge of a sworn bailiff and by him conducted to your jury room for deliberation. When you retire thereto, you will select one of your number to act as foreman, and when you have agreed upon a verdict you will sign the same as directed in these instructions and return it into court.

"James W. Steen, Judge."

## EXHIBIT "C."

MOTION FOR NEW TRIAL. (Formal parts omitted.)

"Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, and moves the court to vacate and set aside the verdict heretofore returned into court by the jury in the above entitled cause on the 3rd day of December, 1913, and for a new trial therein for the following grounds and reasons, to-wit:

"FIRST: Because of the irregularity in the proceedings of the court and jury, and in the trial of said cause by which the defendant was prevented from having a fair trial.

"SECOND: Because of the misconduct of the jury.

"THIRD: For the reason that excessive damages appear to have been given by the jury under the influence of passion and because of the prejudice of the jury in said cause.

"FOURTH: Because of error in the assessment of the amount of recovery, the same being too large in each and every instance and particular and for each of the persons respectively and specifically mentioned in said verdict.

"FIFTH: The verdict of the jury is not sustained by sufficient evidence.

"SIXTH: The verdict of the jury is contrary to the weight of the evidence.

"SEVENTH: The verdict of the jury is contrary to law.

"EIGHTH: Because of errors of law occurring at the trial and excepted to by the defendant herein at the time.

"NINTH: The defendant in addition to the above and foregoing causes and grounds for a new trial, and without waiving any of said

grounds, alleges that the court erred in giving to the jury instructions Numbers 9, 10, 11, 12 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 38, to the giving of which said instructions and each and all of them the defendant at the time objected and excepted.

“TENTH: The court erred in withdrawing from the jury instruction No. 39, after the same had been submitted to them, and upon request by said jury for an explanation thereof, which said instruction is in words and figures as follows, to-wit:

“‘39. The court instructs the jury that there can be no recovery in this case upon plaintiff’s allegation that the defendant was negligent in that the engineer of engine No. 2113 was running his train at a high rate of speed, and in not using the train power brakes by which he might have controlled its speed, or have stopped it when signaled to do so, as alleged in sub-division O of the tenth paragraph of plaintiff’s petition.’

“Said request from said jury, being in words and figures as follows, to-wit:

“‘Hon. Jas. W. Steen: The jury in the Bond, Adm’r. vs. R. I. R. R. Co., as a whole requests explanation as follows:

“‘Part of the body contends that this section 39 relieves the railroad company from liability of negligence if they were running at a high rate of speed.

“‘A part of the jury further contends that this paragraph only pertains to the use of the brakes.

(Signed) “‘Fred Walker, Foreman.’  
to which action of the court in removing from the list of instructions and withdrawing the same from the jury upon said request of the foreman,

above mentioned, the defendant objected and duly excepted at the time.

"ELEVENTH: The court erred in refusing to give instructions Numbers 1, 22 and 11, which were at the time requested by the defendant, and to which refusal of the court to give said instructions, the defendant at the time duly excepted."

## EXHIBIT "D."

OPINION OF THE SUPREME COURT OF THE STATE OF  
OKLAHOMA.

IN THE SUPREME COURT OF THE STATE  
OF OKLAHOMA.

No. 6528.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, *Plaintiff in Error.*

*vs.*

A. P. BOND Administrator of the Estate of WILLIAM  
L. TURNER, DECEASED, *Defendant in Error.*

1. Where a suit in damages for personal injuries was based upon the theory that deceased was entitled to the benefits of the Federal Employers' Liability Act (35 St. at L., 65); that defendant was engaged in interstate commerce; that deceased was an employee of defendant and engaged therein at the time of his death and that defendant's negligence, among other things, consisted in operating its train which killed deceased in violation of the Federal Safety Appliance Act of March 2, 1893, as amended by Acts approved April 1, 1896, and March 2, 1903; and, where defendant pleaded, among other things, that deceased was an independent contractor, and stood on a written contract existing between defendant and deceased at the time of his death, **Held:** That whether he was or was not an independent 'con-

tractor, was a question of law for the court to be determined from the fact of the contract construed in the light of the surrounding circumstances.

2. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subjected to the control of his employer except as to the result of the work.

3. Where, at the time he was killed, deceased had a contract in writing with the defendant company obligating him, at his own cost but for no specific time, to furnish all labor necessary to handle all coal required by the company at Enid and to unload the same from its cars to its coal chutes and pick up all coal dropped in so doing" and place the same on cars or engines where desired" by the company; also to break it into certain dimensions and unload "all coal for stationary boilers; also to unload wood from cars to storage piles in its yards there and to load cinders on its right of way at points designated by the company"; also to be punctual and to discharge his duties thereunder without delay or inconvenience to the company and should he fail, neglect or refuse to perform the contract, the company had the right to terminate the same at any time without being liable in damages therefor; the company to be the sole judge as to whether he faithfully and satisfactorily performed the same; all tools to do the work were to be furnished by the company and returned by deceased at its termination; the company to keep a record of all coal delivered at the chutes for unloading and deceased to make daily reports of the cars un-

loaded under the contract and receive, collect and deliver to the authorized agent of the company a ticket from each engineman or other employee, showing the number of tons of coal delivered to any engine, and not to sublet the work without the written consent of the company, HELD, That the relation existing between deceased and defendant thereunder was that of master and servant and not proprietor and independent contractor, and this too although the contract provided: "It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing of such work other than as to the result to be accomplished."

4. Where in a suit in damages for personal injuries based upon the Federal Employers' Liability Act (35 St. at L., 65) one defense was that although defendant was engaged in interstate commerce deceased, if an employee of defendant was not engaged in interstate commerce at the time he was killed, and where the contract existing between them in effect constituted deceased an employee of defendant at work in its yards at Enid at the time he was killed; and the evidence reasonably tended to prove that his duties were to unload cars of coal into its chutes and to unload the same from there into the tenders of its engines engaged in hauling its interstate and intrastate trains; that a record of the coal thus unloaded and loaded was kept in the shape of tickets deposited in boxes at the chutes; that it was the duty of deceased each day, between four and six o'clock, to turn these

tickets in the nature of a report over to an agent of defendant at its freight house some distance up its tracks northward from its chutes; and that while crossing the tracks on his way to the freight house to do he was run over and killed by one of defendant's backing trains, **HELD**; That the evidence was sufficient to take to the jury the question of whether deceased was killed while engaged in interstate commerce.

5. Evidence Examined and Held that, as the same reasonably tends to prove that the engineer knew or ought to have known when he first saw deceased detecting on the track in front of him that he would be upon the track when the train reached him and could have avoided injuring deceased by the exercise of proper care had the train been running at a lawful speed, the question of defendant's negligence was for the jury.

6. Evidence Examined and Held that, as the same reasonably tends to prove that the engineer failed, while running the train in question, to use and operate the continuous train power brake, with which the train was equipped, in violation of the Federal Safety Appliance Acts of March 2, 1893, as amended by Acts approved April 1, 1896, and March 2, 1903, the question of whether he did or not was for the jury. (Syllabus by the Court.)



ERROR FROM THE DISTRICT COURT OF  
GARFIELD COUNTY.

JAMES W. STEEN, *Judge.*

AFFIRMED.

C. O. BLAKE, R. J. ROBERTS, W. H. MOORE, J. G.

GAMBLE and K. W. SHARTEL,

*Attorneys for Plaintiff in Error.*

JOHN C. MOORE,

*Attorney for Defendant in Error.*

OPINION OF THE COURT.

By Turner. J.

On June 4, 1913, defendant in error, A. P. Bond, as administrator of the estate of William L. Turner, Deceased, sued plaintiff in error, Chicago, Rock Island & Pacific Railway Company, in the District Court of Garfield County, in damages for personal injuries resulting in the death of his intestate. The suit was brought under the Federal Employers' Liability Act (35 St. at L., 65), and upon the theory that defendant was engaged in interstate commerce; that deceased was an employee of defendant and engaged in interstate commerce at the time of his death and that defendant's negligence, among other things, consisted in operating its train, which killed deceased, in violation of the Federal Safety appliance Act of March 2, 1893, as amended by Act approved April 1, 1896, and March 2, 1903. On June 24, 1912,

defendant petitioned to remove the cause to the United States Court for the Western District of Oklahoma, which refused to take jurisdiction, and the cause remanded to the State Court. After amended petition filed and demurrer thereto overruled, on November 14, 1913, defendant, after a general denial, answered admitting its corporate existence and that it was engaged in interstate commerce and that deceased met death at the time and place set forth in the petition, but denied that he was an employee of defendant at the time and alleged that he was an independent contractor. There was trial to a jury and judgment for plaintiff and defendant brings the case here, assigned that the court erred in refusing to direct a verdict for defendant at the close of all the evidence. As the undisputed facts disclose that deceased was run over and killed by one of defendant's train of cars while it was backing in the company's yards at Enid, assuming that he was then and there in the discharge of his duties under the contract, the question whether he was an independent contractor or simply an employee of defendant turns upon the construction of the contract, and is a question of law for the court, *Chicago, R. I. & P. Ry. Co. vs. Bennett*, 128 Pac., 705. This sends us to the contract. But before we examine the contract it is contended by counsel for plaintiff that the question of whether deceased was an independent contractor is *res adjudicata* because, he says, the United States Court, in effect, held, in remanding the case to the State Court, that such he was not and, further, that he, at that time, was an employee of defendant en-

gaged in an act of interstate commerce and that such holdings are binding on this court. Plaintiff cites no authority in support of this proposition and as we can find none and are of opinion that the only question decided by that court, which is binding on this court, is that it had no jurisdiction in this cause, we pass to the construction of the contract. It is dated November 10, 1910, and therein deceased is called the "contractor." It obligates him, at his own cost but for no specific time, to furnish all the labor necessary to handle all coal ("required" by the company at Enid), from its cars to its coal chutes and to pick up the coal dropped in so doing "and place same on cars and engines as desired" by the company. Also to break it into certain dimensions and "to unload all coal for stationary boilers." Also to unload wood from cars to storage piles in its yards there and to load cinders from its right of way to cars "at points designated by" the company. It required him to be punctual in the discharge of his duties thereunder and to keep a sufficient number of men to unload the coal without unnecessary delay or inconvenience to the company and provides that the company shall not be liable for his death or injury while employed in the work. Also, that should he fail, neglect or refuse faithfully to perform the contract that the company reserves the right to terminate the same at any time without being liable in damages and to be the sole judge as to whether the contractor is "faithfully and satisfactorily" performing the same. All tools to do the work were to be furnished by the company and were to be returned by the contractor at its termination. It further provides:

"It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing such work other than as to the result to be accomplished."

Also for the purpose of settling with the contractor, the company would keep a record of all coal delivered at the chutes for unloading together with the number of tons in each car unloaded; that the contractor would make daily reports of the cars unloaded by him and "receive, collect and deliver" to the authorized agent of the company "a ticket from each engineman, hostler or other employee showing the number of tons of coal delivered to any engine." Closing, the contractor agrees not to sub-let the work without the written consent of the company. Aiding in the construction of this contract the surrounding circumstances disclose that the yards referred to are located at Enid and, between the company's engine house on the south and Market Street crossing it at an obtuse angle on the north, is 3100 feet long north and south and about 325 feet wide east and west. Running out of the engine house northward are four tracks; the distance from the engine house to the coal chutes, northeast on the right of way, is about 200 feet; on the right of way are numerous tracks some of which lead along side this coal chute and from thence northward past stock-pens, some five hundred feet on the west, and a freight house and platform some four hundred feet long, about nine hundred feet from the stock-pens on the east, and the passenger

depot some seven hundred feet from the freight house on the same side of the tracks and near Market Street on the north. The tracks east of the depot and freight house are nine in number and include the main line, the passing track and yard track and a water crane is located at the south end of the platform of the passenger depot, which is about five hundred and fifty feet long. From all of which it seems that this is the yard or right of way referred to in the contract and that the coal chute referred to in the contract is one hundred feet long and contains twenty-two pockets. Also that the cinders which deceased thereby contracted to load might be located anywhere upon this yard; that the storage piles of cord wood might also be so located, as might the sand cars to be unloaded, and that the engines to which he was required under the contract to supply coal might get it while along side the coal chute of might receive it anywhere upon the numerous tracks in this extensive yard. *Chicago, R. I. & P. Ry. Co. vs. Bennett*, 36 Okla., 385, lays down the rules by which to construe this contract and determine from it whether deceased was an independent contractor or a mere servant or employee of the company. This was a suit in damages by plaintiff against the company for negligently injuring him while in its employ as servant. One of the defenses was that, at the time he was injured, he was an independent contractor. The facts were undisputed and his contract with the company lay in parol. At the time he was employed by defendant to unload cars of coal into the tenders of defendant's engines as they lay along side

and he was injured while so doing. His tools were furnished by the company. Defendant contended, we presume, for an application of the rule laid down in *The Singer Manf. Co. vs. Rahn*, 130, U. S. 440, where that court held that the relation of servant existed only where the employer retained the right to say "not only what should be done but how it should be done," and insisted as plaintiff was paid by the ton that its station agent gave him no directions as to how he should unload the coal into the tenders, that he was an independent contractor. But in determining whether he was an independent contractor or not the court, quoting approvingly from *Thompson on Negligence*, Sec. 622, said:

"\* \* \* In every case the decisive question is: Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? Does he reserve to himself the essential power of a master? It is but another form of language expressing the same idea to say that the true test to determine whether one who renders service to another does as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. On this question the contractor under which the work has been done must speak conclusively in each case, reference being had, of course, to surrounding circumstances."

And from the 4th Words and Phrases, 3542:

"An independent contractor is one who, exer-

cising an independent employment, contracts to do a piece of work according to his own method, and without being subject to the control of his employer except as to the result of his work. *Waters vs. Pioneer Fuel Co.*, 52 Minn., 474, 55 N. W., 52, 38 Am. St. Rep., 564; *Indiana Iron Co., vs. Gray*, 19 Ind. App., 565, 48 N. E., 803, 807."

"But," said the learned Commissioner, "the test is not

whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under the contract of employment, taking into account the circumstances and situation of the parties and the work, to so control and direct him in the work. *Moll on Independent Contractors*, 35; *Linnehan vs. Rollins*, 137, Mass., 123, 50 Am. Rep., 287. A case directly in point is that of *C. P. Hamilton vs. Oklahoma Trading Co.*, 33 Okla., 81, 124 Pac., 38, and the numerous authorities cited and quoted from. See also *Chas. T. Derr Const. Co., et al., vs. Gerruth*, 29 Okla., 528, 120 Pac. 253."

He further cites *Moll on Independent Contractor* at page 76, where it is said:

"The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to

give directions in regard to the details of the work."

And at page 77,

"It was held in Massachusetts that the employer's intention to retain the right of exercising control, and hence creating the relation of master and servant, should always be inferred when it appears that the employment was general, and not based on a contract to do a certain piece of work in certain specified terms in a particular manner and for a stipulated price."

And, governed by these rules, held that the plaintiff in that case was not an independent contractor but an employee of the company. If in that case plaintiff was held to be nothing more than a mere servant or employee, we can not see how we can hold that he was other than that in this case. Considering the contract in whole and construing it in the light of surrounding circumstances: Here is deceased who was given a shovel by the company and put to work unloading cars of coal into a chute, placed there by the company, with directions to also unload sand from its cars at point on its right of way to be designated by the company when occasion should arise. He was also required, under his contract, to load cinders, at points to be designated by the company, from its right of way into its cars. Also to unload cord-wood where designated on storage piles along its right of way. Clearly in order to know what cars to unload he would have to be told by the company and, when told, the company would so far superin-



tend his work and control his actions. And this too under the stipulation contained in the contract that he was liable to be discharged at any time or the contract terminated, which is practically the same thing, at the pleasure of the company. We can see nothing more in the contract than that deceased was a common laborer; an employee of and under the control and supervision of the company and subject to discharge at the pleasure of the company.

It takes very little for courts to hold that one is subject to the control of another and hence a servant and not an independent contractor under the arrangements existing between them. In *Johnson vs. Hastie*, U. P. Q. B., 232, one M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While doing so defendant, who lived a short distance away, come occasionally to see how the work was progressing, and on one occasion advised him to set fire to the log heaps, M. told him that a certain brush fence mighttake fire but defendant said it would make no difference. M. then fired the heaps and went home, during which time the fire spread and burned plaintiff's fences. It was held upon this evidence that M. was not an independent contractor over whom defendant had no control but was his servant or employee. It seems the case turned on the act of control stated and defendant was held guilty of an act of negligence. In view of all of which we say that as the contract in question obligated decease to furnish all labor "required" to handle all coal "furnished" by the company at Enid and to unload its cars in its coal chutes, "and place

on cars or engines as desired" by the company and "to unload all coal for stationary boilers" located not telling where on the company's right of way and to unload wood from its cars on storage piles in its yards there and to load cinders from its right of way to cars "at points designated by the company," a fair construction of the contract is that the company had the right, under the contract, to control and direct him in the work and that he was an employee of the company and not an independent contractor. Besides the contract characterizes him as an employee by reason of the fact that the intent of the contract is to reserve the right in the company to discharge him at its pleasure. Some of the cases hold that this in itself is sufficient to hold him to be an employee under the contract. In *Southern Cotton Oil Co., vs. Wallace*, 23 Tex. Civ. App., 12, D. was engaged by an oil company to bale cotton-seed hulls with its machinery at so much per bale. It exercised control over the manner in which he did the work. It had the right to discharge him at any time. It was there held that D. was an employee of the company. In *Steger vs. Harrett*, 124 S. W. (Tex. Civ. App.), 174, the 5th syllabus reads:

"Where the operator of a corn sheller employed the owner of a traction engine to assist in shelling corn and to furnish power for the work at a specific sum per day for the use of the engines and for his services, the owner being subject to the orders of the operator and liable to be discharged at any time, the owner was not an 'independent contractor,' but was a servant of

the operator, for whose acts the operator was liable. See also *Western Union Tel. Co. vs. Parsley*, 114 S. W. (Tex. Civ. App.), 156; *Bernaer and Ruh vs. Hartman Steel Co.*, 33 Ill. App., 591; *Holmes Jr., vs. Tennessee Coal etc. Co.*, 49 La. Ann., 1465; *Burke Resp. vs. The City & County Contract Co., Appellant, Impleaded with N. Y., W. & B. Ry. Co., defendant*, 133, App. Div. (N. Y.), 113, and the valuable and exhaustive note to *Messmer vs. Bell etc. Co.*, 19 Ann. Cas. 1.

Not only did the contract reserve to the company the right to control and direct deceased in his work but it might be well to know, although we are only passing on the face of the contract, that the company, pursuant to the power therein reserved, did that very thing, which confirms us in our opinion, gathered from the fact of the contract, that the same was not capable of execution without such direction and control. Such amounts to a practical construction of the contract by the company. Mr. Bowman, station agent and yardmaster of defendant, testified:

“Q. From whom did Turner get instructions about handling work performed by him?

A. Under his contract, from us.

Q. You directed him what to do?

A. Yes, either me or my chief clerk.

Q. So that he was under your supervision and control all the time?

A. In so far as his contracts were concerned, yes, sir.

Q. He performed his duties in accordance with what you directed him to do?

A. Yes, sir.

Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island Coal?

A. Yes, sir."

We are therefore of opinion that, at the time he was injured, deceased was not an independent contractor but an employee of the company and is entitled to recover under the Federal Employers' Liability Act, —that is if, at that time he was "engaged in Interstate Commerce," within the contemplation of the Act. The Act relied upon is entitled "An Act relating to the liability of Common Carriers by Railroads to their Employees in certain cases." That part pertinent to our inquiry provides:

"Section 1. That every common carrier by railroad while engaged in commerce between any of the several States \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative \* \* \* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

It is conceded that defendant at the time deceased was injured was engaged in interstate commerce and that the men in charge of the train while backing were, at that time, employees of the company, but it

is contended that as there was no evidence reasonably tending to show that deceased was at that time engaged in interstate commerce, he was not entitled to the protection of the act and the court should have directed a verdict for defendant upon this ground. On this point the evidence fairly discloses that, it was the duty of deceased to order coal for the chutes, and when the cars were placed along side, to unload the coal into the chutes and from there into the tenders of defendant's engines engaged in both intrastate and interstate commerce. It was also his duty to make daily reports of the cars unloaded by him and receive and deliver to a representative of the company a ticket from each engineman or other employee of the company showing the number of tons of coal delivered to any engine operated by the company. These tickets, when received by him, were kept in two boxes at the coal chutes and each day, between four and six o'clock in the afternoon, were turned in by him to Mr. Wallace, chief clerk of the company at the freight house. He also had a contract with the Enid Mill & Elevator Company, whose place of business abutted on the company's right of way some seven hundred feet diagonally across the tracks to the northeast, and perhaps others, to unload coal from the company's cars consigned to them, for which no tickets passed. The evidence also discloses that on the day he was injured, tickets had thus accumulated in the boxes at the coal chutes and two such tickets were thereafter found by Mr. Wallace in the north box; that about four o'clock that afternoon, Conway, who was assisting deceased in

unloading a car of coal at the chutes left there and went to deceased, who was assisting in loading a car of coal for said elevator company on the yards near its plant, and informed him that he was through unloading whereupon deceased started back towards the chutes and disappeared among the cars standing upon the tracks; that he was next seen about five o'clock, at which time he was in the plant of said company and wanted to hire help to load said car; that he remained there perhaps twenty minutes and left going in a southerly direction down the tracks; that shortly thereafter he was seen by Henderson, the fireman of that concern coming from that direction as he was standing on a pile of cinder at the south end of the plant; that when deceased joined him there, witness, who was engaged in hauling cinders from the boiler room, testified:

"A. Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think I would, and he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said: 'There is 24, I must go to the freight depot and take my coal tickets and order coal for the chutes,' then he turned around and walked off toward the freight depot."

The evidence further discloses that in making his way to the freight house deceased went south from where they were talking along and between the strings of cars standing on the tracks until he reached a point south of the north end of the freight house,

where he turned and rounded the end of the string to his right and, after perhaps crossing a track or two, walked northward between the tracks in order to get around the north end of another string between him as he turned, without knowledge of its presence and when he was at a point east of the north end of the freight house an engine and two box cars and a flat car, backing on the track to his left in the direction in which he was going and running at about twenty-five miles per hour, and in excess of the speed prescribed by the city ordinance, ran over and killed him as he turned, without knowledge of its presence until too late, and attempted to cross the track in front of it. All of which reasonably tends to prove that the deceased was engaged in interstate commerce at the time he was killed. This for the reason that his contract required him to furnish the labor that coaled the engines and made the steam that created the power that sped the trains carrying both intrastate and interstate commerce on its way and that the turning in of the tickets to Wallace at the freight house was, in a manner, making his report to the company of what he had done, which was incident to his contract and within the scope of his employment. In other words we are of opinion, it being conceded that defendant was engaged in interstate commerce at the time, that so was deceased for the reason that at that time he was engaged in his master's business and was furnishing or in the act of attempting to furnish something to contribute thereto.

In *Darr vs. Baltimore & Ohio Ry. Co.*, 197 Fed., 665, plaintiff was employed by defendant and was in-

jured while in his service. He brought suit under the Employers' Liability Act and recovered a verdict. The defense was, as here, that he was not entitled to the benefits of the act in question because he was not engaged in interstate commerce when injured. The facts were that on the morning of the accident and shortly before it occurred, one of defendant's trains had been brought in from Brunswick, Maryland, through West Virginia to Cumberland, Maryland. Later in the day the train was taken back over the same route. Upon its arrival at Cumberland, the train was run on what was called the "fire track." A bolt had fallen out of the brake-shoe on one of the wheels of the tender as a result of which the brake-beam hung down in dangerous proximity to the rail and plaintiff was directed to make the necessary repairs while the tender was on the "fire track." While so doing he was injured as a result of the negligence of a fellow employee who had, contrary to directions of plaintiff and unbeknown to him, put the air on the brake. Under this state of facts it was held that as defendant was engaged in interstate commerce that plaintiff was engaged therein at the time he was injured within the meaning of the act and could maintain his suit. In that case if plaintiff, while replacing a bolt, was engaged in interstate commerce he would probably have been so held to have been engaged had he been run over by defendant's train while on his way to replace it with the bolt in his hand. On the strength of which we hold that deceased was engaged in interstate commerce while making his way to the freight house with these



tickets in his hand. We say he had these tickets in his hand at the time he was killed for the reason that the evidence reasonably tends to prove that fact although they were never found, so far as the record discloses. Had they ever been found after the injury under circumstances showing that he did not have them at the time, defendant would not have been slow to disclose that fact. Their absence can be accounted for and the jury might have fairly inferred from the evidence that after he left Conway at four o'clock to go to the coal chutes he got them and had them in his possession when at five o'clock he said to Hutchinson that he must go and turn them in and started for the freight house and that they were blown away by the force of the high wind prevailing at that time or were otherwise lost in the excitement of the casualty.

We said that the taking of these tickets by deceased to the agent of defendant at the freight house was incident to his contract with the company and within the scope of his employment. When such is the case and the employee is injured while engaged in the execution of a duty thus incident he is entitled to the protection of the act. In *Carr. vs. N. Y. C. & H. R. R. Co.*, 16 N. Y. Sup., 501, plaintiff was a brakeman in defendant's employ as one of a crew on what was known as "pick up train No. 181," running between points in the State of New York. When the train reached Tonawanda there was in the train a number of cars loaded with freight destined and consigned to points outside the State and the train was engaged in both intrastate and interstate commerce. In the train was a car billed to North Tonawanda and an-

other loaded with freight billed to another point in the State. Both of these cars were loaded and shipped from a third point in the State. Orders were given to the train crew to cut out these two cars at North Tonawanda and place them on the siding there. In cutting them out the plaintiff was directed to climb on top of one of them and set the hand brakes so they would not move after being placed on the siding. Owing to the fact that while so doing a fellow-brakeman was negligent in uncoupling the compressed air hose, the wheel used by plaintiff in setting the brake was caused to revolve rapidly in the opposite direction from those on cars in common use and the sudden reverse motion to operate so as to throw him from the car and injure him. It was held that he was engaged in interstate commerce within the contemplation of the act and was entitled to maintain his suit that this work at the siding was merely incident to the operation of the train in interstate commerce. In *Illinois Central R. R. Co. vs. Behrens, Adm., etc.*, 233 U. S., 473, 58 L. ed., 1051, quoting approvingly from *Pederson vs. Delaware, L. & W. R. Co.*, 229, U. S., 146, 57 L. ed., 1125; 33 Sup. Ct. Rep., 648, the court speaking to the act, said:

“ ‘There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. \* \* \* ‘The true test always is: Is the work in question a part of interstate commerce in which the carrier is engaged?’ \* \* \*

In North Carolina R. Co. vs. Zachary, 232 U. S., 248, 58 L. ed., 591, the case turned upon whether the evidence reasonably tended to, proves how that deceased was engaged in interstate commerce at the time he was killed. The court held that it did. The evidence disclosed that train 72 of the Southern Railroad Company had come into Salem, N. C., from a point in Virginia and other points and that a "shifting crew" was "working" the train so as to take two cars from it and put them into a train that was to include these two cars and other cars to be hauled from Selma to a point in North Carolina by engine No. 862, upon which deceased was employed as fireman for the trip about to begin and had already prepared his engine for the trip. After inspecting, oiling, firing and otherwise preparing his engine for the trip, he left it and started across the tracks in the yard in the direction of his boarding house and was run over and killed by another train as a result of the negligence of his fellow-employees. The court said:

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in *future*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See Pederson vs. Delaware L. & W. R. Co., 229 U. S., 146, 151, 57 L. ed., 1125, 1127, 33

Sup. Ct. Rep., 648; *St. Louis S. F. & T. Ry. Co. vs. Seale*, 229 U. S., 156, 161, 57 L. ed., 1129, 1134, 33 Sup. Ct. Rep., 651.

"Again it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tends to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for that purpose, and that he had not gone beyond the limits of the railroad yards when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, K. & T. R. Co. vs. United States*, 231 U. S., 112, 119, ante, 144, 34 Sup. Ct. Rep., 26."

"We conclude that, with respect to the facts necessary to bring the case within the Federal Act, there is evidence that at least was sufficient to go to the jury. \* \* \*"

In *St. Louis S. F. & T. Ry. Co. vs. Seale*, 229 U. S., 156, the facts were that defendant was a Texas corporation owning and operating a railroad which extended from the Oklahoma line southward through North Sherman and other points in Texas and connected with the Oklahoma line which extended northward into Oklahoma through Madill and North Sherman. Deceased was employed by defendant as yard clerk in its yards at North Sherman. His prin-

cipal duties were to examine incoming and outgoing trains and make a record of the number and initials on the cars, to inspect and make a record of the seals on the box car doors, to check the cars by the conductor's lists and put cards or labels on the cars to guide the switch crews in breaking up incoming trains and making up outgoing trains. His duties related both to intrastate and interstate commerce and at the time he was killed he was in the discharge of his duties and was on his way through the yards to one of the tracks therein to meet an incoming train from Madill. While so doing he was struck and fatally injured by a switch engine negligently operated by the employees in the yard. After stating the question involved to be whether the Federal Statute was applicable and whether the injury complained of was sustained while the company was engaged and while deceased was employed by it in interstate commerce, the court said:

“In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because the yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and cars taken to the appropriate tracks for

making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line. *McNeill vs. Southern Railway Co.*, 202 U. S., 543, 559. See also *Johnson vs. Southern Pacific Company*, 196 U. S., 21."

From which we learn that, as the duties deceased was discharging there and here at the time he was killed related to both intrastate and interstate commerce, it was not incumbent on the plaintiff there or here to disassociate by proof the one from the other but that he was entitled to have the jury say whether at that time deceased was employed in intrastate commerce. And that it will not do to say that, in as much as it is impossible to say whether deceased had in his hands tickets for coal supplied to engines engaged in interstate commerce or tickets for coal used by engines engaged in intrastate commerce, there is no evidence reasonably tending to prove that he was engaged in interstate commerce at the time he was killed. This for the reason that the cases cited support the view that, as the evidence fairly disclosed that the tickets were for coal supplied to engines engaged in both intrastate and interstate commerce, it might be fairly inferred that deceased was engaged in an act of both intrastate and interstate commerce at the time he was killed and hence came within the protection of the act or that the evidence was at least sufficient to take the question to the jury of whether he was or not. Besides, in the conversation with Hutchinson before he started, he said that he must go to the freight

house and take the tickets and order coal for the chutes. This was sufficient to characterize his act in going as one pertaining to interstate commerce for the reason that the coal he was talking about was for the use of defendant's engines engaged in both intrastate and interstate commerce and not for the exclusive use of either. We are therefore of opinion that the evidence reasonably tends to prove that the deceased was engaged in interstate commerce at the time he was killed and the court did right to overrule the motion to direct a verdict for defendant, that is, if the evidence was sufficient to take the case to the jury on the question of defendant's negligence.

On this point in addition to what has been said, the evidence reasonably tends to prove that as deceased was walking north between the track number three on his right and track number one, the passing track, the main track and the house track were on his left, all thirteen feet apart; that while walking thus passenger train No. 24, to which he had referred in his talk with Hutchinson, passed him going south on the main track and stopped at the passenger depot just beyond him; that back from the same direction on track two came backing freight No. 2113, consisting of an engine and tender and two box cars and a flat car at a speed of something like twenty-five miles per hour in violation of the City ordinance. It is fair to presume that his attention was attracted by the train which had just passed and that he was unaware of the approach of this freight, which was in charge of an engineer, fireman and two brakemen, the brakemen upon the end of the car nearest the deceased and

one of them seated facing north on the northwest corner of the flat car. Although plaintiff in his petition bases his right to recover on some twenty specific grounds of negligence, including the allegation that defendant, at the time of the accident, had violated the Federal Safety Appliance Act, *supra*, in failing to use the continuous train power brake, with which the engine and cars inflicting the injury were equipped, the court, in effect, peremptorily instructed the jury that plaintiff could not recover on any of them except that ground and the further alleged ground of defendant's failure to exercise reasonable care to stop the train, after the peril of deceased was discovered by those in charge. Of course, if there was no evidence reasonably tending to prove that, after the perilous position of deceased was discovered, the train could have been stopped by defendant in the exercise of ordinary care and the injury averted, had it not been running in excess of the speed of ten miles an hour as prescribed by the ordinance, the court erred in sending the issue to the jury. On this point the evidence further discloses that, being unaware of the close proximity of this backing freight, deceased, deflecting his course to the northwest, stepped upon the track within some seventy-five feet of it and, continuing diagonally between the rails, was in the act of placing his left foot outside the west rail when he was struck by the train and killed. Now here is a defendant, running at an unlawful speed, in a city yard of nine tracks, where from around or through the strings of parallel cars in close proximity on each side, a man might step



upon the track in front of it at any moment, backing its cars over a man rightfully on the premises and unconscious of danger, and contending that such was not negligence, and if it was, the same was not the proximate cause of the injury. In thus contending, defendant might be likened to a man throwing a missile along a crowded thoroughfare and insisting, after a pedestrian, unconscious of the throw, had turned into it and been injured, that no negligence could be attributed to the thrower and that the negligence of the person struck was the proximate cause of his own misfortune. It is sufficient to say concerning this assignment that, as there was evidence reasonably tending to prove that the engineer knew, or ought to have known when he first saw deceased deflecting towards the track in front of him, that he would be upon the track when the train reached him, and could have avoided injuring deceased by the exercise of proper care, had the train been running at a lawful speed, and hence his failure to do so was the proximate cause of the injury, the court did right to send the issue to the jury. A similar situation existed in *St. Louis & S. F. R. Co. vs. Kral*, 31 Okla., 624, except that the train was not running at improper speed. There the railroad and the dirt road converged at an angle of about forty-five degrees. Before the train had reached the point Kral was seen driving his team and converging on the track at that point, and both the train and Kral continued to converge and collided on the crossing. Kral invoked the doctrine of the last clear chance, the company contended, as here, that there was no evidence reason-

ably tending to prove that the negligence of the company was the proximate cause of the injury. We said:

“At the time plaintiff was first seen by the engineer, if he knew or ought to have known that the plaintiff would be upon the crossing when the train reached it, and could have avoided the collision, his failure so to do was the proximate cause of the injury and plaintiff is entitled to recover, otherwise not. And if, in applying this rule to the evidence reasonable men might differ, the question is one of fact for the jury.”

And so we say here. At least there was evidence reasonably tending to prove that after seeing him in peril those in charge could have stopped the train and avoided the injury had the train been running within the speed prescribed by the ordinance.

Although the court in the 11th instruction may not have correctly defined negligence, the court did correctly define what defendant's duties were in connection with the doctrine of the last clear chance, which was all defendant was entitled to. The court said:

“The court instructs the jury that if they find and believe from the evidence that immediately prior to receiving the injury, which caused his death, the deceased, William L. Turner, was walking between tracks 2 and No. 3, in the switch yard at Enid, and that while without looking or listening for an approaching train, he stepped from a position of safety to one of peril and was killed, then your verdict must be for defendant, unless you further find that after he reached a

position of peril, and such peril was discovered by the employees of the railroad company, such employees failed to use the care and caution that prudent persons would use under the same circumstances to avert the injury."

We say all defendant was entitled to, it was more than it was entitled to under the rule laid down in the Kral case, *supra*, and besides, as the element of unlawful speed of the train was omitted from the charge, it was a wonder plaintiff recovered at all.

Neither can we say that there was no evidence reasonably tending to prove that the engineer failed, while running the train in question, to use and operate the continuous train brake with which the same was equipped. This for the reason the engineer received the signal while deceased was on the track forty feet away and, according to the test made by the company, could have stopped his train by a proper application of the brakes within 120 feet. As it was the evidence reasonably tends to prove that he did not stop short of a distance of 360 feet. Hence instructions Nos. 10, 16 and 18 which left the question of whether he did or not to the jury were proper. Nor is there merit in the contention that the court erred in withdrawing instruction No. 39 after it had been given, which in effect told the jury that plaintiff could not recover on that ground. It is sufficient to say of the instructions as a whole that, except as noted, they fairly state the law and for that reason and that we find no error in the record, the judgment of the trial court is **AFFIRMED**.

**All the Justices concur.**

## EXHIBIT "E."

## IN THE SUPREME COURT OF THE UNITED STATES.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY, *Plaintiff in Error*,

*vs.*

A. P. BOND, Administrator of the Estate of WILLIAM  
L. TURNER, *Defendant in Error*.

## ASSIGNMENT OF ERRORS.

Comes now the plaintiff in error in the above-entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the substantial rights of the plaintiff in error, in the following particulars, to wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment rendered in said cause by the District Court of Garfield County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in holding that the facts adduced at the trial of said cause and appearing in the record of said cause in said court were sufficient to constitute negligence on the part of this plaintiff in error (defendant below), and to sustain the cause of action in favor of the defendant in error (plaintiff below) and against this plaintiff in error (defendant below).

3. That the Supreme Court of the State of Oklahoma erred in affirming the action of the District Court of Garfield County, Oklahoma, in giving to the jury paragraphs 10, 16, 17 and 18 of the instructions given to the jury, whereby the defense of contributory negligence of the said William L. Turner, for and on account of whose death this action was instituted, to the extent and in the manner prescribed by the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large, 65), as amended April 5, 1910 (36 Statutes at Large, 291), was denied to this plaintiff in error (defendant below).

4. That the Supreme Court of the State of Oklahoma erred in holding that the said William L. Turner was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad, while engaging in commerce between several States, suffering an injury while he was employed by such carrier in such commerce.

5. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its refusal to hold that the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an independent contractor, and therefore not subject to the terms of the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved

April 22, 1908 (35 Statutes at Large, 65), as amended April 5, 1910 (36 Statutes at Large, 291).

6. That the Supreme Court of the State of Oklahoma erred in its affirmance of the action of the District Court of Garfield County, Oklahoma, whereby there was admitted incompetent evidence, bearing upon the question whether the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad engaged in interstate commerce, and as such himself engaged in interstate commerce.

7. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its construction of the duties imposed by the act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers engaged in Interstate Commerce to equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893 (27 Statutes at Large, 531), as amended March 2, 1903 (32 Statutes at Large, 943), and said Supreme Court of the State of Oklahoma further erred in its affirmance of the action of the District Court of Garfield County, Oklahoma, in giving to the jury in said cause paragraphs 10, 16, 17 and 18 of the instructions given to the jury, whereby this defendant (plaintiff in error here) was denied the defense of the contributory

negligence of the said William L. Turner, for and on account of whose death this action was instituted, to the extent and in the manner prescribed by the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroads to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large, 65), as amended April 5, 1910 (36 Statutes at Large, 291).

8. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that the said District Court of Garfield County, Oklahoma, by paragraph 11 of the instructions given to the jury, erroneously defined the negligence of this plaintiff in error, for and on account of which a recovery might be had, and wholly failed to properly instruct the jury thereupon.

9. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that, by paragraphs 22, 23 and 24 of the instructions given to the jury, they were authorized to consider, in arriving at their judgment, matters and things not in evidence.

10. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that paragraph 20 of the instructions given to the jury, submitted as an issue in the case, whether or not there had been a purpose of intent to evade liability under the Federal Employers' Liability Act (35 Statutes at Large, 65), in the execution of the

contract between the said William L. Turner and this plaintiff in error, since there was no evidence in the record showing such purposes or intention.

11. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that, by paragraph 21 of the instructions given to the jury, the said court attempted to define what facts constitute interstate commerce, and thereby invaded the province of the jury.

12. That the cause of action of defendant in error (plaintiff below), if any, arose solely and exclusively under the expressed allegations of his petition by virtue of an act of the Congress of the United States, entitled: "An Act Relating to Liability by Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large, 65), as amended April 5, 1910 (36 Statutes at Large, 291), as also by virtue of the terms of an act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893 (27 Statutes at Large, 531), as amended March 2, 1903 (32 Statutes at Large, 943), and the trial court and the Supreme Court of the State of Oklahoma, in its decision of this cause, erred in the administration of those acts as applied to this cause.



13. That the cause of action of defendant in error (plaintiff below), if any, arose solely and exclusively under the expressed allegations of his petition by virtue of an act of the Congress of the United States, entitled: "An Act Relating to Liability by Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908 (35 Statutes at Large, 65), as amended April 5, 1910 (36 Statutes at Large, 291), as also by virtue of the terms of an act of the Congress of the United States, entitled: "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893 (27 Statutes at Large, 531), as amended March 2, 1903 (32 Statutes at Large, 943), and the trial court and the Supreme Court of the State of Oklahoma, in its decision of this cause, erred in holding that the facts adduced at the trial of this cause and appearing in the record of said Supreme Court of the State of Oklahoma showed any negligence on the part of the defendant (plaintiff in error herein).

14. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garfield County, Oklahoma, for the reason that said District Court of Garfield County, Oklahoma, wrongfully and erroneously refused to give to the jury defendant's requested instructions Nos. 1, 11, 17 and 22.

Wherefore, for these and other manifest errors appearing in the record, the said The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Oklahoma be reversed and set aside and held for naught, and that the judgment be rendered for plaintiff in error, granting it its rights and immunities under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

C. O. BLAKE,

R. J. ROBERTS,

W. H. MOORE,

J. G. GAMBLE,

K. W. SHARTEL,

*Attorneys for The Chicago, Rock  
Island & Pacific Railway Company,  
Plaintiff in Error.*

Record page 341 (304), testimony of A. A. Bavington.

### EXHIBIT F.

A. A. Bavington, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to wit:

*Direct examination by W. H. MOORE:*

Q. State your name?

By the WITNESS:

A. A. A. Bavington.

Q. Where do you live?

A. Bakersfield, Calif.

Q. Where were you living in July, 1912?

A. El Reno, Okla.

Q. What was your business at that time?

A. Conductor on the Rock Island.

Q. Were you conductor on the train that killed Mr. Turner in July, 1912?

A. Yes, sir.

Q. Where were you at the time of the accident?

A. I was getting a check of some cars I had picked up on the passing track; I was between the passing track and the main track down quite a ways south of where Mr. Turner was struck.

Q. Where was your train standing, the part that was not connected with the engine?

A. My train was in what we call two places on the passing track; I came into Enid with a short train and headed into the passing track, knowing I had to pick up cars here, and left the rear end of my train at the crossing at the depot.

Q. At the passenger depot?

A. At the passenger depot; the caboose was just over the crossing south.

Q. That portion of your train, how far down did that extend?

A. Down to the freight house, may be a little bit this side of the freight house between the water crane and the freight house. The other portion was down below the freight house and down this side, back towards the mill.

Q. At the time the accident happened, were you in a position to see anything of the accident?

A. No, sir.

Q. How soon after it occurred did you get word of it?

A. After it happened Brakeman Portelle came to me and said they had run over somebody, and I came around right away and saw the body lying there and the engine and crew.

Q. So you know nothing at all of the accident itself?

A. No, sir.

Q. Do you know whether that engine was equipped with air brakes or not?

A. I do.

Q. Was it?

A. It was.

Q. Do you know whether the brakes, the air on the two cars connected with the engine was coupled on or not at the time of the accident?

A. It was; I went and tested the brakes after the accident happened. Which it was my duty to do.

By JNO. C. MOORE:

If the Court please, the petition states it was fully equipped with air brakes, and there is no need of encumbering the record with that.

By W. H. MOORE:

I beg the Court's pardon; I didn't know that.

*Cross-examination* by JOHN C. MOORE:

Q. What is your name?

By the WITNESS:

A. A. A. Bavington.

Q. Was there anybody at the body when you got to it?

A. Right at the body, I could not state. But I think that the crew had got down off the engine.

Q. You saw George Wallace, did you?

A. Yes, sir.

Q. Did you see Victor Reems?

A. Yes, sir.

Q. Did you see George Kendrick?

A. I did, sir.

Q. And Mr. Portelle went with you to the body?

A. He called to me and I came back as soon as I could, I followed him around to where the engine was.

Q. And when you got there, five is all that was there?

A. I don't understand the question.

Q. When you and Portelle got there, George Wallace, Victor Reems and George Kendrick were all that were at the body?

A. I could not say positively, although I know that my crew was there; I could not say as to anybody else being there.

Q. Did you remain there until the Coroner or Justice of the Peace came for the purpose of holding an inquest?

A. I did, sir, although I went to the freight office and got hold of Mr. Bowman and told them

to get the Coroner and somebody down there as quick as they could. Also I went to the telegraph and notified the Dispatcher and proper officials that should be notified.

Q. I will ask you as conductor if you did anything further toward reporting the injury?

A. Nothing more than to the officials and to get the Coroner down there and to Mr. Bowman.

Q. I will ask you if the body when the Coroner came was in the same position as when you first saw it?

A. It was.

Q. I will ask you if you took a statement in writing from any persons who witnessed or had a statement to make regarding the accident?

A. I didn't any more than I asked the crew how it happened.

Q. Did you ask anybody else about it?

A. No, sir.

Q. Did you take the statement of the crew in writing?

A. No, sir.

Q. Did you hear the members of the crew sworn by the Coroner?

A. Yes, sir.

Q. Who were sworn?

A. The crew, Mr. Wallace, Mr. Reems, Mr. Kendrick and Mr. Portelle, the Coroner came down and called for the crew.

Q. Did you hear anybody else sworn?

A. I could not state; I don't know whether there was anybody else or not.

By JNO. C. MOORE:

That is all.

Witness excused.



SUPREMACY AND THE CONSTITUTION

IN CHICAGO, ILLINOIS, ON THE 10TH DAY OF JANUARY, 1892

BY HON. WILLIAM H. RAY, ATTORNEY AT LAW

AND OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 486

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
PLAINTIFF IN ERROR

vs

A. P. BOND, ADMINISTRATOR OF THE ESTATE OF WILLIAM  
L. TURNER, DECEASED.

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BRIEF OF DEFENDANT IN ERROR ON THE MOTIONS AND  
ON THE MERITS

JOHN C. MOORE,

Attorney and Counsel for Defendant in Error

IN ERROR TO THE SUPREME COURT OF OKLAHOMA

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IN THE SUPREME COURT OF THE UNITED STATES

No. 486, October Term, 1915

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a  
Corporation, Plaintiff in Error,

vs

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Defendant in Error

Error to the Supreme Court of Oklahoma.

MISTAKE.

Heretofore, on the submission of the motions to Dismiss and to Affirm, plaintiff in error, November 15, 1915, filed its brief in opposition to the motions. On page 5 counsel make an error: They say that the defendant in error alleged, "That the action of the United States District Court after the removal of the cause thereto in remanding the same to the State court, is conclusive of the rights asserted and immunities claimed under or by reason of statutes of the United States."

This is a mistake. What was said is: "The conclusion of the Federal Judge that Turner was an employe and not an independent contractor, which he had to find in order to remand, strengthens the presumption that the State courts did not err in reaching the same conclusion." P. XXII. defendant in error's brief on the motions.

Also, on the question what Turner was doing, same brief, XXV and XXVI, these words:

"The District Court of the United States so held in remanding the case, for without it there could be no remand. Such action strengthens the actions of the state courts in arriving at the same conclusion."

Counsel will, of course remedy the defect in expression immediately on having it called to their attention. Such correction will eliminate their argument commencing on page 54 of their said brief.

ANSWER BRIEF.

Answering the brief of Plaintiff in Error according to its orderly and very able arrangement, defendant in error says of that lettered I, found on page 11, that it discloses a defense founded on opposition to the assertion of a right under a law of the United States. That it would be extremely difficult to claim, under such defense, that the plaintiff in error was asserting a right, or claiming an immunity under a law or an authority of the United States. On the other hand it is plainly asserting a right and claiming an immunity under some other law, or some other authority than that of the United States. This has been the contention from the beginning, though on removal to the United States District Court for the Western District of Okla-

homa, an actual trial was had and the evidence taken, and the question submitted to that court along with the contracts attached to the complaint, and the ruling was adverse to such claim, resulting in an order remanding the cause.

While the State trial court and the Supreme Court, afterward, of their own independent judgment arrived at the same conclusion, yet the fact of the Federal District Court having done so strengthens the presumption always indulged by the Appellate Court, that the two State courts did not err in holding that Turner was a servant, and not an independent contractor.

Plaintiff in Error was well aware that removal could not be had on any statutory ground, and so set up the issue that the Federal law is not the law of the case. To be denied was not to deny a right asserted, or an immunity claimed, under an authority of the United States.

It is not a claim that the facts are different from what the plaintiff below had asserted them to be, and which were proven on the trials, but that their legal significance was different. What the courts passed on was not the facts, but their legal meaning. It denied a claim set up in opposition to rights set out and claimed under a law of the United States. There can not be claimed the right of review on this point, but as this is a question of jurisdiction, defendant in error further considers the point as follows:

## II.

This proposition, beginning on page 38 of the plaintiff in error's brief, is open to that remark found on page 1 of this brief as to proposition No. I in that this was one of the issues made by the defendant below to obtain removal to the Federal court. Like the other, it was not a claim that the facts were different from those alleged, but that their legal significance is that the Federal law does not apply. There is some modification now, to claim some different facts, and it is set out on pages 30 and 31 of its brief as the testimony of Charles Jackson, but of this conversation, Mr. Crumpacker, Mr. Jackson's superior, testifies on pages 155 and 156 as follows:

155. Q.—“What was he doing there?”

A.—“He was conversing with Mr. Jackson and myself.”

Q.—“What was that conversation about?”

156. A.—“I think it was about Mr. Jackson unloading a car of coal for him.”

Q.—“For whom?”

A.—“For himself; they were simply jesting; that is all.”

Evidently Mr. Crumpacker knew that Turner and Jackson were joking each other, yet this joking is relied upon as evidence to show that Turner was doing something else than going to deliver his coal tickets. This preceded his conversation with another witness, Hutchinson, who, on the witness stand made this statement: “Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until

Monday night. I said I didn't think I would, and he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said, "There is 24; I must go to the freight depot and take my coal tickets and order coal for the chutes." Then he turned around and walked off toward the freight depot." P. 212. Before allowing this testimony the court on the same page says: "The only way that can go in is by asking for all of that conversation, of which they have introduced a part." No objection was made, nor interposed, nor exception saved by the defendant below to this testimony.

That the court had previously excluded this testimony as hearsay is shown on page 57, where plaintiff sought to introduce it as a part of the *res gesta*, and was overruled by the court. Then in low voice, so the jury could not hear, made offer of it and was denied. P. 58. Afterward the defendant called this witness as its own witness, and on page 159 drew out of him a part of this conversation, and then the court, on page 212 allowed plaintiff to put the whole conversation in evidence. It is very similar to that found on page 118, showing the extreme care of the court, where the witness, Conway, was asked what Turner said and did. There was objection to what he said, but being a deposition, what he said was entered in the deposition, but not allowed by the court for the jury to hear read. This could not come under *res gesta*, for it was an hour before he was killed, but what he said tells exactly what he was going to do, and was exceedingly material, but the court did not allow the jury to hear, and they never knew. This instance is cited here to show that the court did not err in allowing the full statement after the defendant had called out a part of it. This conversation with Hutchinson contains the last words Turner was ever heard to speak, and from Hutchinson he went direct to his death. He started toward the freight house to take his coal tickets and order coal for the chutes. It is not necessary that *res gesta* be argued as to this, because plaintiff below was entitled to the whole conversation after defendant, using him as its own witness had called out a part of it. *Res gesta* as a theory for admission could be rejected, and yet the evidence be competent because when a portion of a conversation is given the opposite party is entitled to the whole of it.

#### THE MOTIONS.

The first act of plaintiff in error was to file a petition to remove the cause to the Federal District Court. In it it denied that Turner was an employee, and denied that he was engaged in interstate commerce. P. 263.

On this petition the state court made this order:  
"Motion to remove cause from State court sustained on ground that the allegations of the petition show plaintiff's de-

cedent to have been an independent contractor and not an employe as contemplated in the Employer's Liability Act. Exception to plaintiff." P. 264.

The exact meaning of plaintiff in error is shown best by the words contained on pages 9 and 10 of the brief on the motions, which it filed here November 15, 1915:

"(1) That plaintiff's intestate, on account of whose death this action was instituted, was an independent contractor and not an employe of the defendant engaged in interstate commerce within the terms of the Federal Employer's Liability Act (35 Stat. 65.)"

"(2) That plaintiff's intestate, on account of whose death this action was instituted, at the time of receiving the injuries from which he died, was engaged in the performance of a contract between himself and a private industry, and not in the employment of the defendant."

No facts in support thereof, are stated.

The Federal court had a trial, in order to be sure on jurisdiction. P. 162-166, 57 Record and P. 2 brief filed here Nov. 15, 1915 by plaintiff in error.

The result was an order of remand. P. 16 Rec.

That court necessarily decided: (a) That Turner was an employe and not an independent contractor. (b) That he was engaged in interstate commerce, and not in the performance of a contract between himself and a private industry.

Defendant sought that jurisdiction knowing that a writ of error could not be sued out to review the action of the Federal court in remanding the cause because prohibited by the 28 section of the Judicial Code, and knowing that it could not be reviewed in this action, because it is a writ of error to the highest court of a state.

McLaughlin Bros. v. Hallowell, 228 U. S. 278.

Whitcomb v. Smithson, 175 U. S. 635.

Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556.

The monitor of the decision, is this: That if the plaintiff in error ever hoped for review in this court, as now sought, that it should have withdrawn its opposition to the Federal Act as the law of the facts, and should not have continued to set up some other right or immunity than that granted by the United States. It did not do so but continued in its course.

It asked the trial court this instruction:

"The court instructs the jury that under the evidence in this case, the deceased, William L. Turner, at the time of his death was what is known as an independent contractor, and was not at said time an employe of the defendant engaged in interstate commerce within the meaning of the law, and its verdict must be for the defendant." P. 226.

The court refused this.

The request was not an assertion of a right under a law of the United States.

This refusal appears here now, as the Fifth assignment of error. P. 5. Also Fourth P. 5, and Sixth, P. 6.

#### SUGGESTION.

The state courts found as the Federal court had done. Interposing the contention that some other than the Federal law applies to the case is a failure to assert a right or ask an immunity under an authority of the United States as to these two points. There was, therefore, no denial of such request.

There are two great central facts about which there is no disagreement:

One, that Turner worked for the road.

The other, that he was killed by it.

The remainder of this prief is devoted to the merits.

#### MERITS.

##### I.

The switch yards at Enid are quite extensive. See the plat pasted to page 149. A vast amount of railroad business was done there. One A. J. Bowman was agent and yard master at Enid the day Turner was killed. P. 165. He had all the information, and made his own orders from the information that came to this office. Turner was working under his orders and directions so far as his contracts were concerned. P. 167. That Turner got instructions from him, Bowman, about handling the work performed by him under his contracts. That he was under his supervision and control all the time so far as his contracts were concerned. P. 168. That he performed his duties in accordance with what Bowman directed him to do. Pp. 168-169. That either he or his chief Clerk directed him what to do. P. 168. That all the coal he handled for the chutes was Rock Island coal. P. 169. That he did work aside from his contract in transferring freight. He was employed the same as any other extra labor. For this at times he was paid by voucher and at times he was carried on the labor roll. P. 165. The Chief Clerk, referred to by Bowman, named Wallace, testifies on page 57, that he had control over the work and labor of Turner. Turner was under the control and direction of the Round House Foreman in cooping cars. P. 80. That he unloaded kindling at various times. P. 79. This was not under the contract. He unloaded coal from cars at Enid into the road and switch engines. P. 167. This was not under a contract. He transferred freight from car to car. This was where there were bad order cars, and he transferred the freight to good order cars. P. 73. This was not under contract. But it was done by him under orders and directions of the officers, and all the while both of his contracts were subsisting contracts. Under one contract, P. 83, he unloaded coal into the chute pockets, he picked up the "chute droppings" and



put them on engines or cars as the company desired. He broke all coal to four inch cubes, he unloaded wood on storage piles on the right of way, he unloaded coal for stationary engines, he loaded cinders at places designated by the company, he unloaded sand from cars designated by the company, he received and turned in all coal tickets left by engineers for coal delivered to engines, he reported all coal unloaded, he was prompt at his work, he agreed to surrender his contracts and to submit to discharge without the right to damages at any time if he should fail, refuse or neglect to perform his duties under his contract and gave the company its option to at once terminate the contracts, and to be the sole judge whether he was faithfully performing his duties as prescribed. He was to work with the tools they furnished him and to keep them safe, and return them, and if lost to pay for them, and they might keep their value out of his wages, and the company measured and paid according to their measures, and they required him to make daily report of cars unloaded by him, and to collect and deliver the coal tickets. He was to be paid on the 20th of the following month after his work was done, and he bound his executors, etc. He agreed that the railway company shall not be liable in case of his death or injury while employed in the work, and he agreed to be responsible for all injuries to persons in his service whether the same shall be occasioned by reason of the negligence of the railway company or otherwise, and the company inserted another clause called the ninth in which it is said that the company holds no control over him in doing the work other than as to the results to be accomplished. Under the other contract he was to cooper cars for grain under the direction of the Round House Foreman. P. 80.

Circumstances frequently have a great influence on the manner in which a contract is to be performed. Here is an extensive switch yard, with the chutes at its southern limit. (See plat). Somewhere there are stationary boilers. Piles of cinders accumulate. Cord wood comes in in the night. Cars of sand are received. A grain company has ordered cars and they have arrived. Broken cars are there loaded with freight. And many other conditions. Turner comes to work at his appointed hour. Bowman has on his desk communications showing all these things and many others, and everybody who works there is under his orders. Turner can not tell until some one tells him, where to begin work. Bowman knows, because he has the facts. Turner gets his orders from Bowman, not how to hold a shovel in his hand, but what car to commence work on. Bowman knows that such a car must be sent by a certain hour to some other point, Turner does not. Bowman knows what the rush matters are. Turner does not. Turner, could not go into the yard and commence work which would effectively put forward the transportation and business for he does not know



which must be done now. Bowman does. He directs Turner what to do. Then what next to do, and so on. So Bowman truly says that so far as Turner's contracts were concerned, he was under Bowman's control and direction all the time. Not part of the time, but all the time. So he says, and it must be true, for the contract would have little force unless it could be made to work effectively.

Now that ninth clause, P. 85, in these words:

"Ninth, It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor and the Railway Company reserves and holds no control over him in doing of such work other than as to the results to be accomplished."

If such is to be the meaning and operation of the contract, then Bowman could not direct Turner to do this or that. The transportation must necessarily suffer for lack of knowledge on the part of Turner what to do.

That clause is in the same contract which provides that Turner shall not hold the company liable in case of his death or injury while employed in this work, and where he agrees to pay the damages for killing or injuring his employes even though done by the negligence of the company.

There steps in to cure such overreaching these words:

"That any contract, rule, regulation, or device whatsoever, the purpose and intent which shall be to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void." Fifth section Employer's Liability Act.

As the ninth clause is at variance with the evident intent of the contract that Turner shall all the time be under directions, it can have no meaning but to surrender the right of Turner or his legal representative to sue under this act in case of his injury or death. That is why it is inserted in the contract, and four of the able counsel of the road sign their approval of the form. P. 86. It is their work, not Turner's. His improvidence, is an impressive illustration of the wisdom of Congress in enacting the quoted clause of the Fifth section.

What is and what can be the reason for the insertion of that ninth clause? There must be a reason or it would not be there. Its function is contradictory of the evident intent of the contract. It is apparent that Turner ignorant of what must be done first, but aware that there are many things to do, can not determine what is best. Bowman, knowing all about the service and the pressing needs, is the best man to direct Turner in the most effective way in which to do the work. This, the contract contemplates. That ninth clause was devised and inserted in that contract six months after the amendments of April 5, 1910, to the Federal act. Judicial construction had not then been had, but now it has. The amendment has been sustained. Its func-

tion was and is to avoid the inhibition of the act. That must have been the reason for its insertion in the instrument. It will be observed, that with this eliminated, not a word of evidence exists to indicate Turner an independent contractor. That plaintiff in error relies on this, alone, is evident from it being quoted on the 22nd page of its recent brief of November 15, 1915. Also on page 35 of current brief.

If the object and intent of that clause was not to exempt the company from liability of damages under this act, it is exceedingly difficult to determine its function in the contract. It certainly is at variance with the multitude of duties performed by Turner under Bowman's direction and control.

As to this feature, the best definition seems to be:

"An independent contractor is one who is not controlled by the owner in his work, and if the master reserves the control over him, or directs his work or can direct his work, then he is not an independent contractor. It is the control which the owner exercises or has the right to exercise, that determines the relation."

Atlantic Transport Co. v. Conys, 82 Fed. 177.

We conceive of an independent contractor as one who takes a contract to build a house, to construct a specific piece of work, or do a particular thing, and he takes his own way for it, and the owner has nothing to say about how he did it, provided the work is completed and turned over according to contract. So, we get this definition:

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own method, and without being subject to the control of his employer except as to the result of the work."

Words and Phrases,—Title—Independent Contractor.

Now, all of Turners work was just common hard work. He knew better that Bowman, just how to shovel coal or lift freight etc., but he did not know whether he must move freight first or shovel the coal first, or the sand first, or the cinders first or unload the cord wood first. This was why he must be controlled. But he had no control over the machinery and dangerous appliances as all independent contractors have, but was subject to injury all the time by the manner in which others handled the cars, locomotives, etc. Besides he was not doing any specific piece of work, but just such work as was pointed out to him. In the Atlantic Transport case, *supra*, one witness testified that some times there was pointed out work, but as a rule the men saw what was to be done and did it. The court held that the right to point out the work, even though not often if ever exercised, negatived the idea of an independent contractor.

So, when the work was such common work as shoveling coal, sand, cinders, loading cord wood, handling freight, and gener-

ally any and all kinds of work, that there was created the relation of master and servant. Moll, on Independent Contractors, P. 77. Besides, it stands to reason, that if the labor was just such common work, without science, but mere physical power, and changing continually from one kind to another, and these changes made by orders of the master, that there could not be any independence in the laborer, but that he was a mere servant.

It must be borne in mind that Turner had agreed to be discharged, without right to damages, whenever the company should adjudge that he was not performing his contract according to what they might conclude about it. This is very far removed from being an independent contractor. Turner puts himself under the control of the master as to being discharged. The fact of his being carried on the labor rolls while he had subsisting contracts claimed to be those of an independent contractor, is wholly inconsistent with the idea of his being such contractor. The fact that he did whatever he was told to do, precludes the thought that he was doing any specific job of work. In several of the items the expressions are used, "as desired by the railway company." P. 28. "At points designated by said Railway Company," P. 28-29. "On Railway Company's right of way in said city." P. 28. All these imply that the company reserves the right over these things as to where they shall be done, or the manner in which they shall be done.

It does not appear to defendant in error that counsel could hold Turner an independent contractor and not an employe, under the state of facts existing especially in view of the Fifth section of the Act, made on purpose to protect improvident laborers, from overreaching subtle expressions devised by the wisdom of acute lawyers.

## II.

Soon after four o'clock p. m., July 28, 1912, Conway, a helper, who had been shoveling coal on the chutes for Turner, went to him, where Turner was shoveling coal from the ground into a car for the White Mill, and told him the coal was all unloaded on the chutes. 117. Turner started down the car toward the chutes. This was before Train No. 24 had arrived. 118. This was the proper hour in which to gather the coal tickets. 88. Turner is next seen at the ice plant where he is joking with a man named Jackson about loading a car of coal. 156. This was from 5 p. m. until 5.25 p. m. 161. At 5.25 p. m. he went to Hutchinson on a cinder pile a few feet away from the ice plant. 57. Hutchinson testifies: "Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think I would. And then he pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said, 'There is 24, I must go to the freight

depot and take my coal tickets and order coal for the chutes." Then he turned around and walked off towards the freight depot." P. 212. He was killed on the way, and within ten minutes. P. 57.

There is nothing, whatever contradicting this testimony. What Turner said was allowed by the court because the defendant company had drawn out a part of the conversation, and the court then allowed all of it. P. 212.

There is no testimony, whatever, that he was on any other mission. His words above testified to were the last he was ever heard to speak.

There is not a word of testimony that he was performing a contract with a private industry when killed.

His sole mission at that time was to do the two things his contract required: To turn in the coal tickets, and to report the coal all unloaded. 212.

The contract required Turner to collect and turn in the coal tickets daily. P. 85. Each engineer taking coal was required to leave a coal ticket. P. 88. They put them in a box placed in the side of the chute for that purpose. P. 88. These tickets gave the date, the engine number, the number of the train, the number of tons taken, the engineer's name and the fireman's name. 88. The plaintiff, in writing, demanded of the defendant an inspection of all coal tickets received by them in the twenty four hours preceeding Turner's death, and on November 19, 1913 moved the court for an order on the company to produce them, and served same on defendant. P. 40. On the 21st day of November, 1913, the court sustained this motion, and made an order requiring it. 41. This was by provision of a statute of Oklahoma, see Exhibit A, hereto attached. No compliance with this order was ever made by the defendant company, nor reason ever adduced. All coal tickets were forwarded by the Chief Clerk to the Chicago office. P. 211. Turner turned in his coal tickets every day. P. 74. 88. They covered the time "All the way from four to six o'clock the day before up to the time that he turned them in." P. 88. "It had been customary for Mr. Turner to bring the coal tickets to my office." (Chief Clerk, Wallace). 88. These tickets were to show what became of the coal that was unloaded and in what way it was used and to keep the coal account correct. 89. The coal he shoveled into the pockets was for the use of the locomotives indiscriminately traveling locally and out of the state. 80. 73. He procured his coal tickets out of two boxes at the chutes, and about five o'clock daily took them to the freight house and delivered them there. 73. Whenever they were out of coal he would order coal. 74. (This was to the chutes.) He turned in no coal tickets the day he was killed. P. 90. The Chief Clerk remembers it because after Turner was killed he went to the coal chutes to get the tickets, and he got "some" tickets. 90.

He did not otherwise indicate how many. After Turner was killed a witness went to the chutes and looked into the north box and saw there was as many as two tickets. P. 134. The witness was asked. "What was your purpose in going down there then?" He answered: "I heard them take Charley Nelson's statement about what Turner had told him about the tickets, and I thinks I would look in the box and I looked and there was as much as two tickets in that box." 142. This was after they took Mr. Turner away. 142. Between the time Turner had gone to the chutes and the time when he was killed, two engines had been there, No. 24, about which Turner had spoken at the cinder pile, and 2113, which pushed the little train which killed him. 63,64. The record is silent as to whether they left coal tickets. If they did and the Chief Clerk got them, they were not produced in court as the court directed. If they were all that the Chief Clerk got when he says he got "some" tickets, they would in court have shown that the other tickets, accumulated for the previous twenty-four hours were not then in the chutes. It is a reasonable presumption that those were all that the Chief Clerk got, and if the others were not in the boxes, that Turner had them on his person when killed, for he had gone for them. His words to Hutchinson indicate that he had them, for he was going to the freight house "and take my coal tickets." 212. But none were found on his person. The body was dressed in blue overalls with a common work shirt, such as a workman usually wears. He had been at work; his clothes were still dirty and wet with sweat. P. 52. He had been shoveling coal. 117. The weather was hot, blustery and windy. P. 54. It was pretty windy from the south until about two o'clock and from that on from the southwest. 59. The train which killed him was running twenty to twenty-five miles an hour. "Coming in very fast." P. 64.

If Turner's clothes were wet and dirty with sweat the pockets of his garments would most likely spoil the coal tickets if he had them in his pocket. It is most probable that to avoid this he carried them in his hand. If so, when struck could he be expected to still clutch them? With the high wind and the fast moving train they would certainly be scattered by the wind. We do not know the number of tickets, but there were 22 chute pockets, P. 121. This indicates supply of coal for a large number of engines. There were from 75 to 80 tons a day taken by engines. P. 135. 136. Engines took from two to eight tons. P. 136. Five tons was the average. P. 136. Thus twenty-four hours would furnish fifteen or sixteen coal tickets, at the very lowest estimate.

If 24 and 2113 took coal, and the Chief Clerk got those and no others, then, to produce them before the court would be very strong presumptive proof that Turner had taken out the others before those trains came in. The company thought best not to

produce the tickets.

Defendant in error now asserts that the record contains no fact to show that Turner on the trip to his death was engaged in the performance of a contract between himself and some private industry, and further asserts that all of the testimony indicates that he was going on the interstate duty of turning in his coal tickets and reporting all coal unloaded on the chutes. "Order coal for the chutes" means, "report all the coal unloaded on the chutes." It was equivalent to an order, for coal must be kept there all the time.

With the showing thus made on the merits, it is seen how hollow and unsubstantial were the claims that Turner was not an employee but an independent contractor, and that he was not engaged in interstate commerce, but in a contract between himself and some private industry.

He was engaged in interstate commerce when killed.

Mondou Cases, 223 U. S. 1.

North Carolina R. Co. v. Zachary, 232 U. S. 248.

St. Louis, San Francisco & T. R. Co. v. Seale, 229 U. S. 156.

Pederson v. Delaware, Lackawana & W. R. Co. 229 U. S. 146.

N. Y. Central & H. Riv. R. Co. v. Carr, 35 S. C. R. 780.

Horton v. Oregon-Washington R. & N. Co. 130 Pac. 897.

Montgomery v. Southern P. R. Co. 131 Pac. 507.

### III.

#### NEGLIGENCE.

George H. McBlair testified that he was standing in ten or fifteen feet of the water-spout at the south end of the depot when 24 had come in, hardly stopped 63, and Turner was just starting across the centre track of the nine tracks, and a train was coming toward him about fifty or seventy-five feet from him, and he was walking north-west crossing the track walking moderate not noticing the train coming behind him but looking at 24 which was north and some west of him, the train backing from the south and one man on it who hallowed when they were twenty or twenty-five feet from Turner. He had stepped his left foot over the west rail, when the brakeman hallowed he turned to the right looking eastward, the train hit him and drew him down. The train was running—"I judge twenty or twenty-five miles an hour." Coming in very fast. P. 64.

Q.—"Were you in plain view of this occurrence?"

A.—"Yes, sir."

Q.—"Did you see Mr. Turner stop his left foot out there?"

A.—"Yes, sir."

Q.—"What was he in the act of doing when the brakeman yelled?"

A.—"He was just in the act of stepping his right foot over the rail and clearing the track."

Q.—"Then you heard the brakeman yell?"

A.—"Yes, and Mr. Turner turned to the right." 65.



Q.—“And while he was in that position what happened?”

A.—“He was hit with the train and knocked down across the rack.”—66.

The court instructed the jury as follows: P. 223.

“38. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman waited to give the signal until the deceased was in imminent peril and that instead of giving the train signal he gave a loud and piercing yell, which caused Turner to stop and throw himself in a position where he could not escape injury, as alleged in sub-division N. of the tenth paragraph of plaintiff's petition. Unless, you believe that the acts of the brakeman were not the acts of an ordinarily prudent man, considering the surrounding circumstances as they appear from the evidence.”

Given by the court and excepted to by the defendant.

JAMES W. STEEN, Judge.”

The instruction seems to fit the testimony.

Though the defendant excepted below, it does not assign the action of the court, in giving the instruction, as error.

Crump, riding on 24 heard the yell. P. 195.

Eppler, riding on 24 heard the yell. P. 197.

Ernest McBair heard the yell, and 24 was between him and Turner at the time so he did not see the occurrence. P. 72.

Portelle, brakesman, says he yelled. P. 177. He was on the car that killed Turner. Kendrick on the same car said he yelled. P. 182.

Penniman, undertaker, washed and embalmed the body. He found an abrasion on the right side a little back of the median line about the floating ribs, 52, and he could tell that it was made before the pulse had ceased to beat, but a very short time before. P. 53. He qualified himself fully before he stated this fact. It is a matter of general knowledge, and was called out on page 53, that a bruise long before death produces much discoloration, but if there be but few pulsations before death ensues, that the discoloration is slight. It may be added that a bruise made after death produces no discoloration.

If there be *res ipsa loquitur* in this case, then the position of the body furnishes it: The body lay on its face, with the head on the east rail crushed there, extending west the left foot cut off on the west rail and lying outside of it, the right, within that rail, but uninjured, the bruise on the right side. P. 51, 52, 55 and all who saw it.

Turner was walking north west when the brakeman yelled. Pp. 64, 185.

Kendrick, the brakeman who yelled was “practically right there over him when he was struck.” P. '83. He says: “He was angling across and the draw bar struck him; he was angling across he was not going straight across.” P. 183.

The cars were coming from the South. Turner astride the west rail in the act to step his right foot over and in the clear, hears the brakeman Kendrick, who was sitting on the north west corner of the flat car, yell, when he, Kendrick was practically right over him, and Turner walking north west, how could his head be to the east, on its face, with his left foot cut off on the west rail, and his right just within and uninjured his head crushed on the east rail, and a bruise on the right side made just a few pulsations before death, unless he turned to learn the cause of the yell. Turned to the right, turned with his body still leaning, without straightening up, and thus went down across the track to the east.

The brakeman's yell killed him. He was passing in the clear, but the yell called him back into danger, and then too late to escape.

What Gorge H. McBlair stood there and saw took place as he saw it. The body says so. Universal construction, that is the projecting air hose on the left, always, of the bumpers on an advancing flat car, were in the exact position to strike Turner among the floating ribs a little back of the midian line when the body was looking east. No bruises are shown to exist on the back, nor on the left side. The heart would beat several times after being so struck. If he was in act to step and was struck, without turning, his right leg would have been cut off, but he would have fallen northwest. His bruise then would be on the left a little back. Were he standing erect astride the track without turning, his bruise would be on the left, and his body would have gone down parallel with the west rail, and on it or near it. If he were walking north in the center of the track he would have gone down on his face, his head north, and the bruise on his back. None was there. None was on the left side.

Reems was the fireman on the engine which killed Turner. He was in the cab with the engineer, Wallace. He looked out of the east window of the cab and saw Turner walking north between tracks two and three, and he suddenly disappeared. P. 200.

Q.—“Did you when you found he had disappeared, give Mr. Wallace a slow up signal?”

A.—“No sir.”

Q.—“Did you give him a stop signal?”

A.—“No. sir.”

Q.—“Did you inform him of what you had seen?”

A.—“No, sir.” P. 202.

The court gave this instruction: P. 223.

“34. The court instructs the jury that there can be no convey in this case upon plaintiff's allegation that defendant was negligent in that the fireman in the cab with the engine man did not have the engine slowed or stopped when he saw



the deceased entering on track two, until he should see that he had safely passed in the clear, as alleged in subdivision J of the tenth paragraph of plaintiff's petition."

It looks like the fireman let a chance escape, which he had, to save a man's life.

It is noticeable that the plaintiff in error does not complain of this.

The plaintiff below had plead that this little train had been run without using and operating the train power brakes in violation of the named statute of the United States, and that this contributed to the injury P. 25. Assigning negligence, plaintiff used these words: "(p) He was guilty of most culpable negligence in running his train in violation of the statute of the United States as heretofore detailed." P. 27.

The first use of the brakes shown in the evidence is when the brakeman, Kendrick, signalled the engineer, Wallace. Kendrick sat on the north west corner of the advancing flat car as they approached Turner. 182, 179. He faced west. 170. The first thing Kendrick did was to give a stop signal, (indicating), "and we hallowed until the car struck him and passed over him." 182. "Portelle says: 'We both hallowed at him and gave the engineer a stop signal.'" 177. "As quick as we hit Mr. Turner I jumped off the flat car and went ahead to the engine and told them we had killed a man." 177. "I jumped off about the time it ran over him or a little afterward." 179. He left Kendrick on the car. 179. Kendrick says:

A.—"After the man was struck what did you do?"

A.—"I don't know; the first thing I remember I jumped off the car and had my hat off, and then I walked toward the engine." 183. From this it is to be gathered that the stop signal was given by Kendrick, sitting on the northwest corner of the car, and that Turner was struck and run over before either man left the car.

Now, compare this with what the engineer says:

Q.—"What was the first thing that you saw that attracted your attention?" 170.

A.—"I saw Brakeman Kendrick put his hand out like that (indicating) and make a part movement to get on the car, and then turned around and gave me the same signal again (indicating twice violent stop signal). and when he did so I used the emergency brake." \* \* 171.

Q.—"How close together did these two signals come?"

A.—"The first signal he turned his head kind of away from me and then he made a half movement to get on the car, and then he gave it again, and then he looked back." 171.

This testimony indicates that Kendrick was standing on the ground, when he gave the signals which the engineer saw, but both men were on the car and ran over Turner before

they got off. So, the engineer did not see the signals from the car, and saw only those that were given from the ground. But then, Turner had been run over and killed, and it follows that Turner was run over and killed before the train power brakes were used and operated.

Plaintiff in error complains because the trial court gave instruction No. 10-P217, which contains these words:

"Provided, however, that if you believe from the evidence that the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing the same, and that such failure contributed to the injury and killing, then you shall not hold the said Turner as being guilty of any contributory negligence, and shall not diminish the damages from that cause." Given, excepted to, and assigned here.

Complaint is also made of instructions 16 and 17, p. 219, but examination shows that they are what are usually called "academic." At least, they are mere definitions of law. But complaint is also made of 18, which is substantially the same as that portion of 10, quoted above P. 219. Plaintiff in error quotes both of them in full on pages 61 and 62 of the current brief, but omits instruction No. 40, which peremptorily annuls them both, quoted below.

Both of them submitted to the sound discretion of the jury that if they found the unlawful running, and it contributed to the injury, then Turners contributory negligence need not affect their verdict. Now, Turner was guilty of contributory negligence in stepping on the track without stopping, looking and listening, within the strict decision of many cases. So, if this were all on this subject, then the questions were submitted to the jury. But it is not all.

The court, at the solicitation of the Company gave this:

"40. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that it ran its train in violation of the statute of the United States, as alleged in subdivision P of the tenth paragraph of plaintiff's petition." 224.

This was much more direct and positive than ten or eighteen. While 10 and 18 were proper to be given, and 40 not proper in view of the evidence shown above, yet, if 10 and 18 were error, and 40 the correction, it is a familiar doctrine that if error is done and corrected, and it can be shown by the record that the error did not affect the verdict, it shall be considered harmless. This is what the record shows:

From pages 124 to 130, both inclusive, it is shown with great minutiae, and conclusively, that the damages suffered by the several beneficiaries exceeded the sum of Sixteen Thousand dollars. The strictures contained on P. 81, Plaintiff in Errors brief *et seq.* "Instructions on matters not in evidence" are wholly unwarranted. The evidence disclosed the age and

expectancy of deceased. The age of his widow, which was less. The age of each child, and the instructions 22, 23 and 24, clearly show that the jury were to judge from her younger years whether she would have outlived her husband, while the period of legal emancipation of each child was given the jury as a guide. The verdict of the jury, P. 234, was for \$7,583; being less than the half.

That verdict shows that the jury discarded the unlawful running of the train, and charged Turner with contributory negligence in stepping upon the track. They evidently followed the court in giving instruction 40, and did not follow 10 and 18. No. 40 was a positive pronouncement by the court, while 10 and 18 would have allowed the jury to consider whether the signals were given and seen from the car, or whether they were given from the ground after the killing. The discrepancy was among the witnesses of the carrier, and given in chief.

Why could not Kendrick, instead of yelling, sitting on the northwest corner of the advancing flat car, seeing Turner with his left foot on the ground outside the west rail, and leaning forward with his weight on that foot, and in the act to step his right foot over that rail and in the clear, have firmly clutched that flat car with his left hand, and reaching with his right beyond the advance of his car, given Turner a quick push which would have accelerated his motion and assured his safety? That was his last clear chance, and he lost it, and Reems lost his too, while in the cab with the engineer. Neither man did what an ordinarily prudent man could do. Kendrick, by yelling, did an act of commission, of negligence, not mere omission.

The plat of the switch yards shows them wholly within the city limits. Ordinance No. 152, page 109, forbids running cars within the city beyond ten miles an hour. Rawlins, Rock Island engineer of 30 years' experience fixes stopping distance of a little train, when running ten miles an hour at sixty feet. When running fifteen miles at ninety feet. At twenty miles, at one hundred twenty feet. At twenty-five miles a little over one hundred and fifty feet, but a very little over. P. 95. Tabulating all the evidence given by defendants witnesses, which is quite variable, it is shown that the least or minimum distance a train ran after the air went on is 179 feet, and the maximum 227 feet. The speed thus indicated exceeds twenty-five miles, which agrees with the estimate or judgment of the witness, McBlair. Wallace, the engineer, by his testimony of fact, makes the distance 179 feet, but his estimate is 140 feet. Reems, the fireman, by his testimony, makes 182 feet, and his estimate four car lengths, etc. Either estimate or testified fact fixes the speed beyond twenty miles an hour. This was a proper subject for the jury to consider. Grand Jury v. R. Co. v. Ives 144 U. S. 408. The whole testimony

of defendant's witnesses is full of differences and disagreements among themselves, so that conclusion on any given point can not be had with accuracy. The two illustrations given about the signals, and that between the estimates and what are the facts are fair samples of others, equally inconclusive as to results.

The complaint regarding 10 and 18, as instructions being overcome by the positive 40, and the verdict of the jury showing that defendant had all the advantage of it, is another demonstration that this appeal is taken for delay.

Nothing overcomes that negligence of the brakeman.

#### IV.

The specification of errors begins on page 56 of the brief for Plaintiff in error. Counsel divides it into sections (a) and (b).

Instructions given with reference to contributory negligence as pleas, citing instructions 10 and 18, and printing them on pages 58 and 59. What this argument lacks is that counsel fails to include Instructions No. 40, P. 224 Record, on the same subject, in these words: "40. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the statute of the United States, as alleged in subdivision P, of the tenth paragraph of plaintiff's petition." Instruction No. 10, instruction No. 18 and instruction No. 40, go together. They are all on the same point. While 10 and 18 ought to have been given, and were not error, because Turner had been run over and killed before the train power brakes were used and operated and they were not so used and operated until after he was killed. See page 16 of this brief, yet if error, if the jury followed the court in giving 40 and not in giving 10 and 18, as they did, see pages 17-18 of this brief, then defendant was not deprived of the defense of contributory negligence as to the unlawful running of the train.

Instructions 16 and 17, printed on pages 64 and 65 of their brief are academic in nature, but lead up to 18, which is disposed of above. It must be borne in mind, that the giving of 10, 16, 17 and 18 were eliminated by 40 and the verdict of the jury.

The record discloses that withdrawn instruction No. 39 was a proposed instruction No. 17, P. 226, by the defendant. That by mistake it had gotten among the instructions and went to the jury, and being unintelligible to them they asked advice of the court. 228 and 229. Then the Court said: "Gentlemen of the jury, the court now withdraws from your consideration Instruction No. 39, mentioned in your request, it appearing that said instruction was given and embodied in the charge through mistake." P. 229. Again the court said: "On examination of instruction No. 39, I find by mistake that it was included in the instructions, and I now withdraw it." P. 229.

The objection entered was to the withdrawal. Plaintiff in error fails to assert that it was error to refuse to give this instruction, and fails to state that it was entitled to have it given. If it was not entitled to have it given, it was not error to correct the mistake made in a paper getting among the instructions by taking it from among them. It pertains solely to the rapid running of the train and the non control, but when it was withdrawn, the jury were wholly uninstructed on that point. The record then was silent as to advice by the court. As it was drawn it was directly against the evidence. The rapid running was not submitted as an element, and the non use of the brakes was withdrawn by instruction 40. The plaintiff in error uses these words: "The request of the jury is evidence of the confusing nature of the instruction." P. 74 their brief. It was drawn by counsel for the carrier as their offered instruction 17, P. 226 and if its language is confusing they are to blame, not the court.

The giving of instruction No. 11 is alleged as error. Plaintiff in error prints it on page 70. It is there compared with one from this court of many years ago. That by Mr. Justice Swayne is clearer in expression than No. 11 complained of, and of more general use, nevertheless No. 11 expresses the idea, in its abstract sense, and while not quite conventional, yet its dress is sufficient to pass it. When the two are compared, it is seen that the same ideas are but presented in different verbiage. It does not mislead, nor impose a hardship.

(b)

Under (b) of the errors complained of the admission of incompetent evidence in connection with the actions of William L. Turner is alleged.

It is wholly unnecessary to ask this court to make a definition on *res gesta*, or apply the principle of it in this case, because, outside of the testimony which counsel print on pages 75 and 76 of their brief, there is the record where the defendant made this witness, Hutchinson, their own witness, P. 158, and drew out of him, page 159, a portion of the conversation complained of which in their brief they do not mention, and then on page 212, plaintiff took this witness and drew out of him the whole of said conversation in these words: "Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think that I would. And he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said "There is 24; I must go to the freight depot and take my coal tickets and order coal for the chutes." Then he turned around and walked off towards the freight depot." Before this was allowed the court on that same page made this remark: "The only way that can be in is by asking for all that conversation, of which they have

introduced a part.' The defendant saved no exception and made no objection to the evidence thus introduced, and wholly omit it from their brief.

The next under (b) is in permitting the jury to consider matters and things not in evidence under instruction 22, 23 and 24. Counsel prints them on pages 82, 83 and 84. The objection used is that the court overlooked the fact that there was no evidence in the record showing the expectancy of any of the beneficiaries named. P. 84 of their brief. This is true, but the evidence did disclose that the widow was six years younger than her deceased husband, which points to her outliving him, so far as expectancy of life is concerned. In 23 it is the opening sentence; that if the jury believe that in the course of nature the widow would live longer than the deceased, then you may consider his expectancy of life an element of the damages she has suffered. In the next the jury is told that as an element and measure of damages to each child, you may consider the time to elapse until such child is by law emancipated from the control of its parents. By the evidence, page 104, Turner had an expectancy of "23 years and 265 days." That would emancipate each child, because it exceeds 21 years. The evidence was abundant that the damages suffered by all the beneficiaries exceeded \$16,000.

It is just as much a rule that the younger a person may be his expectation is greater, to satisfy the mind, as if the exact expectation were given in evidence. It is deducible from the evidence, just the period of time each beneficiary would enjoy the support. Expectancy of life of each would not aid in forming the conclusion. There were no instructions given not founded on evidence.

If counsel had just remembered that they drew instruction No. 39, which so confused the jury, and that it was never intended by the court to be given to the jury, but got in by mistake, and had mentioned these matters in their specification of errors, the court might better see if there was error. If counsel had alleged that their client was entitled to it, or objected to refusal to give it, they should have said so in urging this alleged error.

In the matter of instruction 11 on negligence, counsel ought in some manner show that the jury was misled to their damage in some way by it.

If counsel had only shown to the court that they drew out a portion of Hutchinson's testimony, and that then the court admitted it on the theory that the plaintiff was entitled to the whole of it, the court would have the matter more fully in view.

Their last alleged error that matters were submitted on instructions 22, 23 and 24 which were not in evidence for the sole fact that the widow and children's expectation of life was not in evidence, is so full of fallacy, in view of the fact that the

evidence disclosed, better than such facts could, the exact period of right as beneficiaries, that too must fall to the ground.

#### COMMENT.

A case resting on a purely Federal Ground must be one in which the plaintiff and defendant, both, concede—Federal law as being the only law involved. A defense setting up other law, takes the case out of the realm of a Purely Federal Ground. The one asserting a right under the law may have review if denied, but the other can not. When independent contractor is set up, and engaged in performing a contract between himself and some private industry is set up, as defense to rights claimed under a Federal act, and such defenses are denied, where is the authority for review? This was done. But such contentions are overwhelmed on the merits by the evidence. Then where is the good faith in such defense? Was not delay the object of the appeal?

There was abundance of evidence of negligence on the part of the carrier notwithstanding the court had by instruction 34 eliminated that negligence of the Fireman, Reems, who had seen Turner disappear, but gave no stop signal, nor slow up signal, nor tell the engineer what he had seen, and by instruction No. 40 had eliminated the negligence in running the train in violation of the statute of the United States, for the brakeman by his yell had called Turner back into the danger from which he was stepping.

On every point defendant in error should be sustained. Plaintiff in error has not asserted that there was absolutely no evidence of its negligence, but in the assignment 2 and 13, there is some reference to error of the Supreme Court of Oklahoma on the subject of negligence.

Defendant in error therefore asks the court to affirm the judgment of the Supreme Court of the State of Oklahoma.

JOHN C. MOORE,

Attorney for Defendant in Error.



### EXHIBIT A.

Section 5095. "Inspection of Documents held by Adverse Party. Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand, within four days be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."

Revised Laws of Oklahoma, Annotated. 1910. Vol. II. P. 1387.



By Mr. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; exception allowed.

By Jno. C. Moore:

Q. I will ask you this: As far as you could see was it caused by the brakeman hallowing—

By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness.

By the Court: I am inclined to think he can detail what he saw to the jury and the jury will determine what was the cause of it.

By Jno. C. Moore:

Q. I will ask you if you saw any signals given by the brakeman to the engineer or fireman?

By the Witness:

A. No, sir.

By W. H. Moore: Defendant objects to that as incompetent, irrelevant and immaterial—

By the Court: Over-ruled; he has answered anyway.

By W. H. Moore: Defendant excepts.

By Col. Jno. C. Moore:

Q. I will ask you if you heard any signals given by the engineer to the brakeman?

123 By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Objection over-ruled; exception allowed."

By W. H. Moore: "Exception."

By the Witness:

A. No, sir.

By Jno. C. Moore:

Q. Did you go to the body?

A. No, sir.

Q. How did you come to be at the depot that day?

A. I had quit the Arctic Ice plant then and come up there to go to my home at Kremlin on Train 24.

Q. Were you in plain view of this occurrence?

A. Yes, sir.

Q. Did you see Mr. Turner step his left foot out there?

A. Yes, sir.

Q. What was he in the act of doing when the brakeman yelled?

A. He was just in the act of stepping his right foot over the rail and clearing the track.

Q. Then you heard the brakeman give the yell?

A. Yes, and Mr. Turner turned to the right.

Q. And while he was in that position what happened?

A. He was hit with the train and knocked down across the track.

By Mr. Moore: "That is all."

Cross-examination.

By W. H. Moore:

Q. This water crane that you speak of is what direction from the depot, is it south, the water-spout as you call it?

By the Witness:

A. Yes, sir.

Q. How far south?

A. It is up at the end of the depot platform.

124 Q. Where was Mr. Turner from you?

A. South-east like.

Q. How far from you in your judgment?

A. I don't know exactly.

Q. What is your best judgment?

A. Probably about 200 feet.

Q. That would put him about 200 feet south of the south end of the depot platform?

A. I would not be sure it was quite that much.

Q. Are you sure it was no further than that?

A. I am not sure of that either.

Q. That is your judgment that it was about 200 feet?

A. Somewhere near that.

Q. You say you were waiting to take Train 24.

A. Yes, sir.

Q. Had "24" passed you at the time you first saw Mr. Turner?

A. Yes, sir, it had just got past.

Q. You saw him as you looked south of the rear end of "24"; the rear end of "24" had passed you before you first saw Mr. Turner?

A. Yes, sir.

Q. Had "24" come to a stop before you saw Mr. Turner?

A. No, not hardly.

Q. Did "24" take water that day?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Were there any cars on the side track between you and Mr. Turner?

A. No, sir.

125 Q. Did you see any cars south of that at all?

A. Well, there was some south of that.

Q. How far south?

A. There was some by the freight house.

Q. Was there any cars north of him?

A. I would not be sure, I think so.

Q. Your recollection is that the first cars north of him were down by the freight house?

A. Well, they extended this way some too.

Q. Now, the first thing you saw of Mr. Turner was it before or after he first got on the track that you saw him?

A. Just before he come on.

Q. Had he turned yet to go on the track?

A. No, not quite.

Q. Was there anything to attract your attention at that time when you first saw him?

A. I was watching the freight come down.

Q. But paying no special attention to Mr. Turner at that time?

A. Not just at that time.

Q. The first you paid any attention to him was when you saw him getting in a position of danger?

A. When I saw him coming on the track.

Q. And the thing that impressed you at that time he was getting in a dangerous position where he would be struck with the train?

A. No; I thought he would make it all right; I was not thinking about him getting struck.

Q. And this train coming in between 20 and 25 miles an hour, you saw the man step on the track with his back to the train, from 50 to 75 feet from it, and you didn't think he was going to get hurt, is that your testimony?

By Jno. C. Moore: "We object."

126 By the Court: I think that is arguing with the witness.

By the Witness:

A. When the train was in that distance from him he was crossing the track then—

By W. H. Moore:

Q. You said awhile ago when he stepped on the east rail that the train was 50 to 75 feet away?

A. Yes, sir.

Q. And when the brakeman hallowed at him he was about 25 feet from him?

A. Something like that.

Q. And going between 20 and 25 miles an hour?

A. Yes, sir.

Q. You didn't go over to the body you say?

A. No, sir.

Q. Did you go away on "24"?

A. Yes, sir.

Q. Where to?

A. To Kremlin.

Q. What is your business?

A. My business then was farming.

Q. What is your business now?

A. Common labor.

Q. Where are you working?

A. Nowhere now.

Q. Where was the last place you worked?

A. I have not done any work since I come down from Kansas this fall.

Q. When did you come down from Kansas?

A. The 20th of October.

127 Q. Where were you living at the time Mr. Turner was killed?

A. My home was out on the farm south of Kremlin.

Q. Do you're people live there?

A. Yes, sir.

Q. Who was the first person you told about seeing this accident?

A. My folks when I got home.

Q. Who was the first one here at Enid, do you recollect?

A. I don't know that I spoke to any.

Q. Did you ever talk to Colonel Moore about it?

A. Nothing only when we were threshing at the shack; I heard him speak about him getting killed down there.

Q. Did you tell him what you had seen?

A. Not exactly.

Q. Did you tell him what you saw down there that day?

A. I told him I was there at the Rock Island depot when that occurred is about all.

Q. Have you talked with him about it since?

A. No, sir.

Q. And when he put you on the witness stand he had no idea what your evidence would be?

A. I had a little talk with the lawyer. I don't know just what day it was.

Q. How long ago was it?

A. One day, I forget which day it was exactly, he asked me if I had seen that down there and I told him I had.

Q. And you told him what you had seen?

A. Well, not exactly.

By W. H. Moore: "That is all."

Redirect examination.

By Jno. C. Moore:

Q. Mr. McBlair, did you see that train which ran over Mr. Turner, stop?

By the Witness:

128 A. It didn't stop until it passed over him.

Q. How far was it from him before it stopped?

A. Well, about the length of the train.

Q. How many cars were in the train?

A. One flat car and two box cars.

Q. Was there a tender on the engine?

A. Yes, sir.

Q. Did they all pass over him?

A. Yes, sir.

Q. Do you mean to say that the distance of the stop was the length of the whole of the train, the engine cars and all?

A. It was right at it.

A. And that they ran north of the body before they stopped?

A. Yes, sir.

Q. Can you remember anything about the weather that day?

A. The wind was blowing some.

Q. Which way was the wind?

A. A little south-west, mostly south.

Q. You spoke of speaking to me at the cook shack, did you get counsel to properly understand you?

A. I didn't mean that I had spoken to you.

Q. Who did you mean you had spoken to?

A. One of my brothers and Mrs. Turner.

Q. Where did you first speak to me or I to you about this case?

By the Court: Gentlemen, it seems to me that is immaterial. It is not only proper for a witness to talk to counsel and counsel to the witnesses, but they should do so.

By Jno. C. Moore: That is all.

Witness excused.

129 EARNEST McBLAIR, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct-examination.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. Earnest McBlair.

Q. Where do you live?

A. In the Steel Plant Addition to Enid.

Q. What is your age?

A. Nineteen.

Q. I will ask you if you were at the Rock Island depot in the City Enid the evening William L. Turner was killed?

A. Yes, sir.

Q. Did you see the cars run over him?

A. No, sir.

Q. Did you see the cars coming up the track as they approached?

A. Yes, sir.

Q. At what speed were they running?

By W. H. Moore: Defendant objects as incompetent.

By the Court: Overruled.

By W. H. Moore: "Exception."

By the Witness:

- A. I would not know the speed but I know they were coming down pretty fast; that is how I come to notice it.
- 130 Q. After they had killed Turner did you see where the body lay?
- A. No, sir.
- Q. Did you see where the train stopped after it had run over him?
- A. Something near the water-spout.
- Q. That is where it stopped, something near the water-spout?
- A. Yes, sir.

Cross-examination.

By W. H. Moore:

- Q. Where were you that day?

By the Witness:

- A. At the Rock Island depot.
- Q. What were you doing?
- A. Getting on 24 going to Kremlin.
- Q. At what part of the depot were you?
- A. At the south end.
- Q. Had 24 come into the depot at the time Mr. Turner was struck?
- A. It was standing there; I was just getting in.
- Q. Where were you getting on?
- A. On the back end.
- Q. Were you getting on the Pullman?
- A. Well, it was not clear back.
- Q. Did you get on the chair car or smoker?
- A. On the smoker I think.
- Q. The depot being here (Exhibiting blue print of yards) is north of the freight house?
- A. Yes, sir.
- Q. There is a water-crane at the south end of this platform?
- A. Yes, sir.
- Q. At the time he was struck you were on the platform there getting ready to get on the train?
- A. Yes, sir.
- 131 Q. And you think in the smoker?
- A. Well, I would not say as to that.
- Q. It was not the Pullman on the rear?
- A. Well, it was about two cars from the back end.
- Q. If "24" was standing there at that time that this extra was backing down this way, would not that throw the train between you and the man?
- A. No, sir, not until I heard the hallowing.
- Q. Aren't you mistaken about whether the train had come in or the position you put Turner in?
- A. No, the train was in.
- Q. And you were up there about two cars from the rear of the train getting on the train?

A. I was far enough back to see it.

Q. How could you see it?

A. I saw it coming up the track and it was coming at pretty good speed.

Q. How far down the track did you see it?

A. It was quite a ways.

Q. Before it got to the freight house?

A. Yes, sir.

Q. Were there any cars standing about the freight house?

A. I didn't notice them.

Q. If there was they would interfere with your sight?

A. I would not say; I didn't notice any.

Q. When did you first learn that a man had been killed over there?

A. I heard the hallowing, somebody hallowed real loud, and before our train went out there was a man told us there was a man killed; I didn't go over there.

Q. Who was the man who told you that?

A. I didn't know him.

132 Q. This witness who was on the stand a minute ago is your brother?

A. Yes, sir.

Redirect examination.

By Jno. C. Moore:

Q. What called your attention to this freight train coming up the track?

By the Witness:

A. At the time I thought it was coming on our track, on the main line where I was, and I kind of looked up and it was coming at pretty good speed.

Q. Were you afraid it was going to run into you?

A. I looked up and thought it was coming that way.

Q. Did you notice anything about the wind that day?

A. No, sir, I didn't.

Q. When you got on the train you didn't know a man had been killed?

A. No, sir, not until after I got on.

Q. You hadn't seen Turner at all?

A. No, sir.

Q. You just simply saw the train coming in?

A. Yes, sir.

Recross-examination.

By W. H. Moore:

Q. You say you didn't know a man had been killed until after the train pulled out?

By the Witness:

A. I knew it before.

Q. Where was it you knew of it?

- A. Right there in the car.
- 133 Q. Who told you?
- A. Some stranger.
- Q. Your brother was with you?
- A. Yes, sir, but he hadn't come in yet.
- Q. Where was he?
- A. He was outside, I guess.
- Q. Did he come into the train with you?
- A. Yes, after a little bit; he come on the same train.
- Q. Did he tell you anything about it after he got on?
- A. Yes, sir.

Redirect-examination.

By Jno. C. Moore:

- Q. Did you hear the brakeman yell?

By the Witness:

- A. I guess it was; I heard a man bellow, the only one I heard.
- Q. Where were you when you heard it?
- A. I was standing right there at "24" then.

Recross-examination.

By W. H. Moore:

- Q. Do you remember whether "24" took water that day or not?

By the Witness:

- A. No, sir, I don't, but I don't think it did.

By W. H. Moore: That is all.

Witness excused.

- 134 GEORGE W. BOND, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

- Q. You may state your name?

By the Witness:

- A. George W. Bond.
- Q. Where do you live?
- A. I live in Enid.
- Q. Were you acquainted with William L. Turner in his life time?
- A. Yes, sir.
- Q. How long had you known him?
- A. I expect about fifteen or twenty years.
- Q. I will ask you if you have been associated with him in labor and work?



- A. About twelve years, I guess.
- Q. Where, side by side and together?
- A. Yes, sir.
- Q. Have you worked here at Enid with him?
- A. Yes, sir.
- Q. What kind of work were you and he doing?
- A. Shovelling coal, transferring, unloading sand and loading  
 cars.
- Q. When you say you were transferring, do you mean you were  
 transferring freight from car to car?
- A. Yes, sir.
- Q. I will ask you if you knew what his general state of health  
 was during all the time you worked with him?
- A. It was fair, it was good.
- Q. What was his ability to perform labor?
- A. He was good at performing labor.
- Q. By ability—I will ask you if he was a good laboring  
 man?
- A. Yes, sir, he could do a good day's work if that is what you want  
 to know.
- Q. What was this coal used for that you and he shoveled?
- A. For engine use.
- Q. For trains that ran out of the State?
- A. Of course; they would have to if they went north.
- Q. About this sand, what was that used for?
- A. For sanding the track and putting on engines.
- Q. And this transferring freight from car to car, what was the  
 use of that?
- A. Well, bad orders—if one was in bad order we would have to  
 take it and put it in another car.
- Q. Where did those cars go to?
- A. I don't know.
- Q. They were not intended to remain in Enid?
- A. No, sir, I suppose not.
- Q. Do you know anything about his delivering coal tickets?
- A. Yes, sir, I know he always delivered his coal tickets in the  
 morning.
- Q. At what time of day did he deliver his coal tickets?
- A. About five o'clock.
- Q. Where did he get them?
- A. Out of two boxes on the coal chute there.
- Q. Then what did he do with them?
- A. Took them to the freight house.
- Q. And delivered them there?
- A. Yes, sir.
- Q. I will ask you if you know anything about his ordering coal  
 chutes?

By W. H. Moore: We object; his duty was fixed by a writ-  
 ten contract.  
 The Court: Overruled.  
 W. H. Moore: Exception.

By the Witness:

Q. Whenever they were out of coal he would order coal.

By Jno. C. Moore:

Q. Do you know anything about his unloading coal for the Enid Ice and Fuel Company, the Enid Mill and Elevator Company and Grubb and Purmort?

A. Yes, sir.

Q. I will ask you about that—at what hours in the day did he generally unload coal for those institutions?

A. He would generally unload for the mill at night and the other places when he got time; he always kept hands there and kept plenty of coal for the chutes.

Q. Do you know how long he had been serving the railroad company?

A. No, I don't exactly.

Q. What is your best knowledge of it?

By W. H. Moore: We object; the written contract speaks for itself.

By the Court: Overruled.

By W. H. Moore: "Defendant excepts."

By the Witness:

A. He had worked a good while, I expect fifteen years for the Rock Island Railroad and may be more; he commenced at Caldwell, the first work I remember of.

137 By Jno. C. Moore:

Q. Did he turn in coal tickets every day?

A. Every day that I know of.

Q. You were with him quite continually, were you not?

A. Of course, I never paid any attention to delivering the coal tickets; he would always say "I will go and take the tickets up," and of course, it was none of my business; I was working.

Q. He did all of that work?

A. Yes, sir.

Q. You worked for him, did you?

A. Yes, sir; I worked for him.

Q. Whose coal was it that you were handling there?

A. I suppose it was the Rock Island's.

Q. It was used by them for its engines?

A. Yes, sir.

Q. And the sand?

A. That was the same.

Q. Did you have occasion to pick up coal from the ground and put it on to engines and tenders or cars?

A. Yes, sir.

Q. And that was Rock Island coal?

A. Yes, sir.

Q. Did you ever assist in unloading cord wood there?

A. Yes, sir, at the round house.

Q. Whose cord wood was it?

A. I suppose the Rock Island's.

Q. It was unloaded for the company?

A. Yes, sir.

Q. In regard to the cinders in the cinder pits, do you know anything about the labor there?

A. We shoveled it all out.

138 Q. How did the cinders come to be in there?

A. They would fill the engines and knock the fires out whenever they went to put them in the round house.

Q. Didn't the engines have a cinder or ash pan below them?

A. Yes, sir.

Q. They were required to dump those ash pans in the cinder pits?

A. Yes, sir, and we would load them into the car.

Q. All this work was being done for the Rock Island Railway was it not?

A. Yes, I suppose so.

By Jno. C. Moore: That is all.

Cross-examination.

By W. H. Moore:

Q. Your work was being done for Mr. Turner?

By the Witness:

A. Yes, sir.

Q. You were not on the Rock Island pay roll?

A. I worked for Mr. Turner.

Q. And Mr. Turner had a contract with some elevators for handling coal for them?

A. I suppose he did, or he would not have handled it.

Q. You know it by seeing him do it?

A. Yes, sir.

Q. What companies did he handle coal for besides the railroad?

A. The white mill, the ice plant and Grubb and Purmort and some for this Arctic ice plant.

Q. How many men did Mr. Turner have working for him?

39 A. Sometimes three or four and sometimes more men?

A. Yes, sir.

Q. And if the work was slight he would lay the men off?

A. Yes, sir, that is the way he had to do it.

By W. H. Moore: That is all.

Witness excused.

Recess.

By the Court: Gentlemen of the Jury: We will now adjourn or a recess until tomorrow morning at nine o'clock; and in the meantime remember the admonition of the Court not to talk about

the case on trial either among yourselves or with any other person, and do not remain in the presence or hearing of any person discussing the case; you will not visit the premises testified about in the case and will keep yourselves entirely free to render a verdict upon the testimony as you hear it from the witness stand under the instructions of the Court, and do not form and come to any definite conclusion in the case until you have heard all the testimony, the instructions of the Court and the arguments of counsel. Be in your seats tomorrow morning at nine o'clock.

Thereupon, the District Court of Garfield County takes a recess until tomorrow morning, viz., November 29, 1913, at nine o'clock, a. m., by order of Court.

140 Morning Session, November 29, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of nine o'clock, a. m. of this day, viz., November 29, 1913, with the Honorable James W. Steen sitting as Judge of said Court, Geo. M. Scifres as Clerk and W. R. Le Compte as Reporter, with the Administrator herein present in person and by counsel, Jno. C. Moore, and the defendant being present by W. H. Moore and Roberts and Curran; the jury, drawn, examined and sworn as the trial jurors in this cause are all present in the jury box, and by order of Court the jury is polled by the Clerk and each juror answers "Present" as his name is called, and they are all present.

Thereupon, the trial of this cause is resumed and the following proceedings had, viz:

By Jno. C. Moore: May it please the Court, I announced yesterday afternoon that I wanted to be heard on a proposition of law and I am ready now to be heard.

By the Court: What proposition is that?

By Jno. C. Moore: It is in regard to the proposition of yesterday.

By the Court: Go ahead until you get through with your evidence, and then I will give the jury a recess and hear you about eleven o'clock.

141 FRANK H. WALLACE, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. State your name to the jury?

By the Witness:

A. Frank H. Wallace.

Q. Where do you live?

A. Enid, Oklahoma.

Q. What is your occupation?

A. Chief Clerk of the Rock Island Freight Office.

Q. How long have you held that position with the Rock Island road?

A. Since October, 1911.

Q. I will ask you if you knew William L. Turner?

A. I did.

Q. I will ask you if you were Chief Clerk, as now, at the time he was killed?

A. Yes, sir, I was.

Q. Where were you the day he was killed?

A. I was at the local freight office.

Q. Did you see the incident of his being killed?

A. I did not.

Q. I will ask you if the incident happened within sight of the freight office?

A. Well, it was not in sight of the freight office, because there was cars between the freight office and the spot where he was killed.

Q. Can you remember how many cars were stretched along the track there?

A. I cannot.

Q. Upon what track were those cars?

A. On the house track.

Q. That is the track next to the freight house, is it?

A. Yes, sir.

Q. I will ask you if the cars on the house track extended farther north than the freight house?

A. I could not say as to that.

Q. Do you remember of ascertaining what engine it was that pushed the cars that ran over Mr. Turner that day?

A. If I remember correctly, it was 2131.

Q. For the purpose of refreshing your memory, I will ask you if it was not 2113?

A. I am not positive as to that.

Q. You are not positive?

A. No, sir.

Q. Who was engineer on that engine?

A. If I remember correctly it was George Wallace.

Q. Who was the fireman on that engine?

A. Vick Reems, I believe.

Q. Have you seen him in Enid since this trial commenced, the fireman?

A. I believe I saw him this morning as I came up.

Q. I will ask you if you have seen George Wallace here?

A. Yes, sir, I saw him this morning.

Q. Were there any brakemen with that train that day?

A. Yes, sir.

Q. Who were they?

A. I don't know, but one of them, I believe, was Portelle, is the name I know.

Q. Do you know another one by the name of George Kendrick?

- A. I know his face, but not by name.  
Q. Have you seen him since this trial?  
A. Yes, sir.  
Q. Did you see Portelle this morning?  
A. Yes, sir.  
Q. Do you know who was the conductor of that train?  
A. Bavington.  
Q. Is he here?  
A. I saw him this morning, yes, sir.  
Q. Now, Mr. Wallace, what was the number of that train, can you tell?  
A. No, sir, I cannot tell.  
Q. What time of day did that train arrive in Enid?  
A. I don't recollect that either.  
Q. You don't remember?  
A. No, sir.  
Q. Which way did it come in?  
A. It came from the north; what we call east.  
Q. It came across the line of the State of Oklahoma?  
A. I could not say as to that.  
Q. Where did it start?  
A. I could not say as to that.  
Q. You don't know  
A. No, sir.  
144 Q. I will ask you if you saw it come into the town?  
A. Well, I don't know that I did, no.  
Q. Did it bring any freight to your office?  
A. I could not say as to that either.  
Q. You don't remember?  
A. No, sir, I had no occasion to look that up at all.  
Q. I will ask you if it was engaged in getting out of the way or of doing some switching to get out of the way of 24?  
A. If I remember correctly, it was doing some switching; I don't know whether it was getting out of the way of 24 or whether they were picking up cars.  
Q. Wasn't there a car to be picked up by it that day?  
A. If I remember correctly, there was.  
Q. Was it a car of chickens?  
A. I don't remember.  
Q. Where this killing occurred, what track was it on?  
A. Well, I don't remember that, either 3 or 4, I could not say which.  
Q. What is the track next to the ware-house called?  
A. The house track.  
Q. What is the next one called?  
A. The main line.  
Q. What is the next one called?  
A. The passing track.  
Q. What is the next one called?  
A. Number One.  
Q. And the next?

145 A. Number Two.  
Q. And the next?  
A. Number Three.

Q. And the next?

A. Number Four.

Q. And the next?

A. Number Five.

Q. And the next?

A. Six.

Q. And the next?

A. That is all.

Q. There are nine in all are there?

A. Yes, sir.

Q. Do you know how wide it is between two rails of a track?

A. No, sir, I do not.

Q. Do you know how wide the space is between two tracks?

A. No, sir, I could not say as to that.

Q. Who was station agent at Enid at the time Turner was killed?

A. J. A. Bowman.

Q. Do you know where he is at this time?

A. I saw him in Enid yesterday.

Q. Saw him yesterday?

A. Yes, sir.

Q. I will ask you, Mr. Wallace, if you knew about Mr. Turner performing labor and services about the yards of the Company there?

A. Yes, sir.

Q. I will ask you what kind of work he did as well as you know it?

By W. H. Moore: "Defendant objects as incompetent, irrelevant and immaterial, for the reason that his services are covered by two written contracts pleaded in plaintiff's petition."

146 By the Court: Over-ruled.

By W. H. Moore: "Exception".

By the Witness:

A. He unloaded coal out of the car into the pockets of the chute and also coopered cars; that is, place the grain door and the burlap on the cars; and he also transferred freight from one car to another in case of a bad order car, and I believe that is all.

By Jno. C. Moore:

Q. Do you know anything about his shoveling coal for stationary engines?

A. Well, he unloaded coal at the round house for that purpose, es.

Q. Do you know anything about his unloading sand?

A. Yes, sir, he unloaded sand also.

Q. Did he unload cord wood?

A. I know at various times he unloaded kindling; I don't know any wood.

Q. What was the use of the coal that he shoveled into the pockets?

A. For use of the locomotives.

Q. Locomotives traveling over the line of the road?

A. Yes, sir.

Q. That would be indiscriminately for locomotives traveling locally and out of the State?

A. Yes, sir, as far as I know.

By Jno. C. Moore: I now desire to introduce in evidence the two contracts referred to in the petition of plaintiff as Exhibits "A" and "B".

Here contracts are by the reporter marked as Exhibits "A" and "B".

147 Which said Exhibits "A" and "B", so offered and introduced in evidence without objection, and as read to the Jury, are in the words and figures following, viz:

#### EXHIBIT A.

This agreement, made in duplicate and entered into this first day of October, 1911, by and between The Chicago, Rock Island and Pacific Railway Company, hereinafter designated "First Party," party of the first part, and W. L. Turner, of Enid, Garfield County, State of Oklahoma, hereinafter designated "Second Party," party of the second part, Witnesseth:

Whereas, the first party owns and operates a line of railroad into and through the City of Enid, Garfield County, Oklahoma, and is engaged in transporting, among other things, grain in bulk; and,

Whereas, in the transportation of such grain, it is necessary that the cars used therefor be prepared or coopered in a certain manner, so as to contain and prevent loss to such grain; and,

Whereas, the first party is desirous of having all cars necessary for use in such transportation at the City of Enid, Oklahoma, so prepared and coopered, in accordance with its rules and regulations with reference thereto; and,

Whereas, the second party is willing to perform such service for the compensation, in the manner and upon the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises and of the stipulations and agreements herein contained to be by the parties hereto respectively kept and performed, it is mutually agreed as follows:

148 First. The second party will prepare and cooper all cars which the Round House Foreman of the first party, at Enid, Oklahoma, may direct to be so prepared, in the manner and in accordance with the following rules, to-wit:

(a) Installing and Burlapping Grain Doors: Apply three standard grain doors to each car door and fasten to posts, using four No. 8 common wire nails in ends of each grain door. Cover with 7½ oz. burlap, one strip 8 feet long, 40 inches wide, and one strip 8 feet long, 20 inches wide, allowing it to overlap ends of grain door six inches and hang loose at the bottom, overlapping car floor ten



inches; also lap 2 inches where strips are joined on the doors. Attach burlap by applying two No. 3 lath lengthwise where same is joined and two lath at top. Burlap at ends of grain doors to be secured with one and one-half lath at each end. Use five No. 4 common wire nails to each full lath.

(b) Burlapping Ends of Car: Apply one strip of  $7\frac{1}{2}$  oz. burlap 12 feet long and 40 inches wide at each end of car, allowing it to hang loose at bottom and overlap car floor 10 inches, extending around each corner of the car and overlapping the sides 21 inches. Secure to end and side of car with four No. 3 common lath applied at top and ends of burlap, using five No. 4 common wire nails to each full lath.

(c) Burlapping King Bolts: If King Bolts protrude through floor of car, place one strip of  $7\frac{1}{2}$  oz. burlap 20 inches wide and 40 inches long, doubled over each bolt and secure with lath.

(d) Patching Defects in Floor and Lining of Car: Place a piece of burlap over opening or defect and nail a board over same of proper size, allowing the burlap to extend out several inches around the edges of the board.

149 (e) Cars Unfit for Grain Loading: Cars with broken end posts, loose side sheathings, leaky roof or other defect, making them unsuitable, must not be coopered for grain loading.

(f) Making Lining and Sheathing of Car Grain Tight: Attention must be given to crevices and openings around the side posts and body braces at the belt rails. Where these posts and braces and brace rods pass down behind the linings, crevices are frequently found; these should be calked with oakum or some like material to prevent grain from leaking behind the lining. A strip of burlap should be applied to the sides of the car 36 inches long and 20 inches wide, just over the body bolster, on account of the strain that is on the car at this point, frequently causing sheathing leaks.

(g) Applying Inspection Card (Form 333) to Cars for Grain Loading: Inspection card (Form 333) must be placed on the car showing that it has been placed in condition for grain loading. This card to show the name of the inspector, station at which inspected, date, car number and initials.

Second. That all cars so prepared by the second party shall be inspected by the Round House Foreman of the first party at Enid, Oklahoma, who shall be the sole judge as to whether such preparation is in accordance with this contract. If it shall be determined by said Round House Foreman that the preparation of such cars is insufficient and not in accordance with the rules herein stated, the second party will do everything necessary to make the same conform to said rules.

Third. The first party will furnish to the second party all materials, of every kind, necessary for use in the preparation and coopering of said cars, and will pay to the second party, for the services rendered, thirty (30) cents for each car so prepared and coopered by him, such payment to be made on or before the 20th day of the month next succeeding that in which the service is performed.

Fourth. The second party agrees in all respects to fully indemnify, save and keep harmless the first party from any and all liability, loss, damage or injury of any kind whatsoever to the property of the first party, or to the property of others in its possession, as a common carrier or otherwise, or to the property of others on or adjoining its right of way, or on account of injury to or death of the employees or passengers of the first party, or on account of injury to or death of others, arising from or in any manner caused by or growing out of the preparation of cars for cooping and in connection with the cooping of cars as provided for herein, including the installing and burlapping of grain doors, burlapping at the ends of the car, burlapping of King Bolts, patching defects in the floor of car or lining car or during general repair of the car to make the same fit for holding grain or in connection with such repair, or making lining and sheathing of car grain tight or in connection with any other work or preparation in and about cars, as covered by this contract, during the life of the same, irrespective of whether or not such liability, loss, damage or injury shall arise from the negligence of any of such employees, passengers or persons.

Fifth. This agreement shall be effective from and after the date of its execution, and shall continue in full force and effect until terminated by either party hereto giving to the other thirty (30) days' notice in writing of its intention to so terminate the same.

151 In Witness Whereof, the first party has caused this agreement to be executed in its name by its duly authorized officer and its corporate seal to be hereunto affixed and attested by its Secretary, and the second party has hereunto set his hand and seal on this, the day and year first hereinabove written.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY,

By C. W. JONES,

*Its General Manager.*

W. L. TURNER.

(L. S.)

Attest:

CARL NUGRIST,  
*Ass't Secretary.*

[Seal R. I. Ry.]

Witnesses:

F. H. WALLACE.  
J. A. BOWMAN.

Approved:

R. J. ROBERTS,  
*As to Form.*

J. H. ———.  
T. H. BLOWN.

Form Approved:

THOS. R. BINAN,  
*Ass't General Attorney.*

152

## EXHIBIT "B".

This Agreement, made in duplicate this first day of November, A. D., 1910, by and between The Chicago, Rock Island and Pacific Railway Company, a corporation, party of the first part, hereinafter called the "Railway Company" and W. L. Turner, of Enid, Garfield County, Oklahoma, party of the second part, hereinafter called the "Contractor."

Witnesseth, That the parties hereto, for and in consideration of the covenants and agreements hereinafter set forth, and of the payment hereinafter provided for, covenant and agree, each with the other, as follows:

First. The Contractor covenants and agrees, at his sole cost and expense, to furnish all the labor required and necessary to handle; and,

(a) To handle all the coal required by the Railway Company at Enid, Oklahoma, from either open or closed cars, or both, and to place same in coal chute pockets of the Railway Company; to gather up all coal that falls from the chute pockets to the ground and place same on cars or engines as desired by the Railway Company.

(b) To break all coal to the size of four inch cubes or less before same is delivered to chutes or engines for engine use and to unload all coal for stationery boilers.

(c) To unload wood from cars to storage piles located on Railway Company's right of way in said City.

(d) To load cinders from said Railway Company's right of way to cars, at points designated by said Railway Company.

(e) To unload sand from cars furnished by said Railway Company at points designated by said Railway Company.

Second. The Railway Company agrees to pay the Contractor in full compensation for services herein provided for, and the Contractor agrees to accept the following rates, to-wit:

Nine (9) Cents per ton for unloading coal from cars to chutes.

Nine (9) Cents for loading coal known as "chute droppings," from the ground to cars. Provided, that where the cars so loaded shall be unloaded into the chutes the Railway Company shall pay an addition- six (6) cents per ton for unloading such coal from cars to chutes.

Ten (10) Cents per cord for unloading wood from cars to the storage piles of said Railway Company, said storage piles being located on said right of way in said City of Enid.

Eight (8) Cents per cubic yard for loading cinders on said Railway Company's right of way upon the cars furnished for same by said Railway Company at the place where said Railway Company places said cars.

Eight (8) Cents per cubic yard for unloading sand on said Railway Company's right of way for use of its engines.

It is expressly understood and agreed that the payment for all services in handling said coal from cars; said coal from ground under chutes known as "chute droppings"; said wood from cars

for storage piles; said cinders for cars; said sand for engine purposes, shall be made upon the estimates and records of the Railway Company as to the amount of coal handled from cars, coal handled from the ground under chutes, wood handled from cars to storage piles, cinders loaded into cars and sand handled for use of engines.

Third. The Contractor shall at all times maintain a sufficient supply of coal in the pockets of the coal chutes in Enid, Oklahoma, for the requirements of the Railway Company, and shall break or crack all coal to sizes suitable for burning as shall be required by the Railway Company.

154 Fourth. The Contractor hereby expressly assumes all liability for all injuries to or death of persons in his employ, and all liability for injury to or loss of his property which may occur in the performance of this agreement, whether the same shall be occasioned by reason of the negligence of the Railway Company, its agents and employes, or otherwise, and the Contractor further covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, losses and recoveries for and on account of any such injuries or death and for and on account of any such injury to or loss of property, or for or on account of any injury to or death of persons in the employ of the Contractor when and while said persons may be in, upon or about the cars, engines, trains, tracks and premises of the Railway Company, and any injury to said Contractor while performing any service under this contract, which might or have been delegated to his agents or employes.

The Contractor further expressly assumes all liability for injuries to or death of third persons, including the employes of the Railway Company, and all liability for injury to or loss of the property of such persons, which may be occasioned by any act of omission or commission, negligent or otherwise, of the Contractor, his agents, servants and employes, while engaged in the performance of this agreement, and the Contractor covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, costs and recoveries for or on account of any such injuries or death of third persons, or for or on account of injuries to or loss of the property thereof; and the Contractor further covenants and agrees that the Railway Company shall not be liable in case of his death or injury while employed in the work herein set forth.

155 Fifth. The Contractor shall be punctual in the performance of his duties under this contract, and shall keep a sufficient number of men employed to unload the coal from cars into the coal chute pockets without unnecessary delay, and without causing the Railway Company any inconvenience or damage.

Sixth. This contract shall begin on the date hereof, and shall continue until terminated, as it may be by either party giving to the other fifteen (15) days' notice, in writing, of an intention to terminate the same, which notice shall specify the date on which the same shall terminate, unless said contract shall be sooner terminated as hereinafter provided.

Seventh. If at any time the Contractor shall fail, refuse or neglect faithfully to perform his duties under this contract, it is hereby agreed that the Railway Company shall have the right and option to at once terminate this contract, without being liable in damages therefor to said Contractor. The Railway Company, acting by its General Manager, or other agent authorized by him, shall be the sole judge as to whether the Contractor is faithfully and satisfactorily performing the duties herein prescribed to be performed by him.

Eighth. The Railway Company agrees to furnish for the use of the Contractor, in performing the services required hereby, the necessary tools, including shovels, coal picks, lanterns, torches and oil for use of the men employed in handling coal through the chutes at Enid, Oklahoma. All such tools, supplies and appliances shall be and remain the property of the Railway Company, and at the termination of this contract shall be returned to the Railway Company by the Contractor, in good order and condition, ordinary wear and tear resulting from the proper use thereof excepted, and excepting also the oil properly used in order to carry out the provisions of this contract. In the event that any such tools or appliances shall be destroyed or injured so that they are unfit for use by any act of the Contractor or his employees, or if they shall be lost or stolen, then in either case, the Contractor agrees to pay the Railway Company the cost of said tools or appliances so destroyed, damaged, lost or stolen, and agrees that the Railway Company may deduct the amount of such cost from any payment or payments to be made by it to the Contractor.

Ninth. It is hereby agreed and understood that the Contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.

Tenth. The Railway Company shall keep a record of all coal delivered at the coal chutes at Enid, Oklahoma, for unloading, giving car numbers and the number of tons of coal in each car unloaded shall be determined by the billing of such car, and the Railway Company shall make settlements and pay the Contractor for handling coal upon basis of such handling. The Contractor shall make daily reports of the cars unloaded by him, and shall receive, collect and deliver to the duly authorized representative of the Railway Company, a ticket from each engineman, hostler or other employe, showing the number of tons of coal delivered to any engine.

Eleventh. Payment for work to be performed under the contract by the Contractor shall be made by the Railway Company monthly, on or before the twentieth day of each month, next succeeding that in which the work is performed.

Twelfth. This contract and all the terms and conditions, rights and obligations thereof shall inure in favor of and be binding upon the heirs, administrators, executors, legal representatives and suc-

cessors and assigns and lessees of both parties hereto; but the  
 157 Contractor agrees that he will not assign or sublet any of  
 the work herein provided for without the written consent  
 thereto of the Railway Company.

In witness whereof, the Contractor has hereunto set his hand and  
 seal and the Railway Company has caused this contract to be signed  
 by its proper officer and its corporate seal to be hereunto affixed  
 and attested, the day and year first above written.

Executed in duplicate.

THE CHICAGO, ROCK ISLAND AND  
 PACIFIC RAILWAY COMPANY,  
 By M. M. WHITENTAR,

*Its General Manager.*

[Corporate Seal.]

Attest:

CARL NYGRIST,  
*Ass't Secretary.*

W. L. TURNER,  
*Party of the Second Part.*

Witnesses to signature of Party of the Second Part:

FORREST NANCE,  
 JNO. R. WEISSINGER.

Approved:

R. J. ROBERTS,  
*As to Form.*  
 H. M. HALWRY (?)  
 T. H. BENSON (?)

Form Approved:

THOS. R. BENRAN,  
*Ass't General Attorney.*

158 By Jno. C. Moore:

Q. Now, I will ask you, Mr. Wallace, if you in your capacity as  
 Chief Clerk of the freight department knew when a train came in  
 from outside of the State?

By the witness, Frank H. Wallace: No, sir, I do not.

Q. You knew what trains were accustomed to coming from out-  
 side of the State, did you not?

A. Well, not exactly, no; I had no occasion to know; a train  
 might start at any point north of Enid and I would not know.

Q. There are trains which run regularly through your station  
 are there not?

A. Yes, sir.

Q. Isn't #95 a freight train that runs regularly through your  
 station?

A. Not regularly; it is scheduled, but there are days when this train is annulled.

Q. As a scheduled train, does it not come from the State of Kansas?

A. Yes, sir.

Q. And George Wallace is the engineer who pulls that train is he not, half of the time?

A. He might be part of the time.

Q. At this time isn't George Wallace the engineer that pulls train #95 every other day?

A. I could not say.

Q. Don't you know what engineers are in charge of engines?

A. No, sir.

Q. Did you have any control over the work and labor of the deceased Turner?

A. Yes, sir, I did.

159 Q. What kind of control did you have?

A. Well, it was my duty to see that the work was done and also to render the statements of coal unloaded by him.

Q. Was it his duty to make his report of coal unloaded to your office?

A. Nothing more than to give me the car numbers of the cars that he unloaded.

Q. That was his report?

A. That is the only report that I know that he made.

Q. Q. That is for unloading coal into the chutes?

A. Yes, sir.

Q. You already had the number of the car as it was set up on the chutes?

A. He reported the cars to me when they were placed on the chutes.

Q. Where did he get the car that was set up on the chutes before it was set on the chutes?

A. It was placed there by a switch engine.

Q. Now, speaking of the switch engine, what are the duties of the switch engine in the yards?

A. To do the necessary switching that is to be done.

Q. I will ask you if you were accustomed to doing any switching on Sunday in July, 1912?

A. If I remember correctly, only on special occasions.

Q. I will ask you if any switching was done on Sunday, the 28th of July, 1912, by the switch engine and crew?

A. Not that I remember of; no, sir.

Q. In fact, there was no switching done that day?

A. Not that I remember of.

Q. Who was the engineer in charge of the switch engine at that time?

A. If I remember correctly, Mr. Rollins; I won't be positive.

160 Q. Now, I will ask you when coal was thrown into the pockets and a report of the amount that was taken away by engines had to be filed in your office, who did that?

A. That is, *what* turned in the coal tickets?

Q. That's it?

A. It had been customary for Mr. Turner to bring the coal tickets to my office.

Q. Did he have an accustomed hour to do that?

A. Well, all the way from four o'clock to six; and sometimes later, no certain hour.

Q. But always in the evening?

A. Almost generally, yes, sir.

Q. For what period of time did those coal tickets cover?

A. All the way from four to six o'clock the day before up to the time that he turned them in.

Q. Do you keep any register of the number of trains that come into your station?

A. Yes, sir.

Q. You keep a register?

A. That is, it is kept at the passenger office.

Q. Now, I will ask you what you recollect about engines taking coal, what was the duty of the engineer in charge of the engine?

A. Well, as far as I know it was his duty to leave a coal ticket.

Q. Where did he put that coal ticket?

A. They have a box placed on the side of the chute for that purpose.

Q. Can you tell me as a rule what a coal ticket ordinarily contained upon it?

A. The date, the engine number, the number of the train, the number of tons taken, the engineer's name and the fireman's name.

161 Q. Then it was papers of that character that had been turned in to you habitually by Mr. Turner from four to six o'clock every day?

A. Yes, sir.

Q. Now, I will ask you if you have in your possession at this time a card of about the size of a coal ticket?

A. No, I have not.

Q. For the purpose of enabling you to show to the jury about what size a coal ticket is, will you have the kindness to cut that blotter into a form of about the size a coal ticket would be? (Exhibiting to witness small blotter.)

A. That is just a fraction larger, I believe. (Witness cuts blotter to a size about  $2\frac{1}{2}$  inches by  $2\frac{1}{2}$  inches.)

Q. Are there any other entries upon a coal ticket except what you have stated?

A. None that I remember of now.

Q. I will ask you if any portion of a coal ticket was printed?

A. Yes, sir.

Q. What part was printed?

A. Well, as near as I can remember it is the blank for the Engine Number, the train number, "Engineer" and "Fireman" and the blank for the number of tons taken and the estimated number of tons taken.

Q. You mean that those words were so printed upon the ticket



that they could be filled in to show, for instance, the train number, and then the engineer would put the number opposite that?

A. Yes, sir.

Q. Then when a coal ticket was filled and complete you could tell from it what engineer got the coal, could you?

A. Yes, sir.

162 Q. And how much he got?

A. Yes, sir.

Q. And when he got it?

A. Yes, sir.

Q. Did it give the hour of the day when taken?

A. No, sir.

Q. Of what use were those coal tickets to the Rock Island railroad?

By W. H. Moore: If your honor please, it seems that this is unnecessary detail; otherwise, I have no objection to it.

By the Court: I don't see the necessity of the detail, Colonel.

By Jno. C. Moore: We can infer what the use of the coal tickets are, but whenever we——

By the Court: Well, let him answer the question.

By the Witness:

A. To show what became of the coal that was unloaded and in what way it was used.

By Jno. C. Moore:

Q. Did it not also serve you for the purpose of keeping your coal account correct?

A. Yes, sir.

By Jno. C. Moore: "You may cross-examine."

Cross-examination.

By W. H. Moore:

Q. Mr. Wallace, where were you, if you know, at the time Mr. Turner was killed?

By the Witness:

A. I was in the local freight office.

163 Q. How long after he was killed, if you know, did you receive notice of his death?

A. I could not say as to how long, but it could not have been very long.

Q. Did you go to his body?

A. Yes, sir, I did.

Q. Where with reference to the freight house was his body lying?

A. Well, I could not say exactly, but it was east of the freight ware room.

Q. The railroad runs there generally north and south?

A. Yes, sir.

Q. And the freight house sits on the west side of the tracks?

A. Yes, sir.

Q. And he was somewhere east of the freight house?

A. Yes, sir.

Q. I will ask you to look at this blue print that I hand you, which locates the depot here (Indicating on blue print) and the freight house here (Indicating), is that about a correct representation of the yard down there?

A. Well, yes, it looks like it was.

Q. This where I have my pencil is shown as the north line of the depot? (Indicating on blue print.)

A. Yes, sir.

Q. Was his body north or south of that north line of the depot?

A. If I remember, it was south of the north line of the depot.

Q. What is your judgment, how far south of the north line of the freight depot was the body lying?

A. That I could not say, because I have no recollection as to how far it was.

164 Q. But it was somewhere in that neighborhood?

A. Yes, sir.

Q. You say there was a string of flat cars on the house track next to the freight depot?

A. There was cars on the house track.

Q. In going from the freight depot to the body which way did you go to the body?

A. I went off the north end of the platform around the cars but I could not say how far north I went before I went around the cars.

Q. In going north you were going towards the passenger depot?

A. Yes, sir.

Q. How many people were there when you got there?

A. Well, as near as I remember there was no one there but the conductor; they were coming from all around though.

Q. You have testified in regard to these coal tickets that Mr. Turner usually turned in at the freight depot, do you know whether or not he had turned in his coal tickets on this day prior to the time he was killed?

A. No, sir, he had not.

Q. How do you know that?

A. Because I remember going for the tickets after it happened myself.

Q. Where did you go after those tickets?

A. I went to the coal chutes.

Q. What time of day did you go to the coal chutes, do you know?

A. I could not say as to the hour.

Q. But some time that afternoon?

A. Yes, sir, some time after this happened.

165 Q. Did you get the coal tickets there?

A. I got some coal tickets, yes, sir.

Q. You didn't see anything of the actual happening of the occurrence there?

A. No, sir.

Q. Did you see "24" come in that evening?

A. Well, no; I have no recollection of it.

Q. Those trains come and go there and unless your attention is called to them specially you pay but little attention to them?

A. Yes, sir.

Redirect examination.

By Jno. C. Moore:

Q. You say you went to the body of Mr. Turner?

By the Witness:

A. Yes, sir.

Q. Which direction did you go from the freight house in order to get to the body?

A. Well, I went out of the north door of the freight office and went down to the end of the platform at the north end and went around the cars, but I could not say how far I went before I went around the cars.

Q. There was one or two cars standing on the house track north of the incline?

A. I could not say; I went to the north end of the platform and if I remember right I went around a car.

Q. When you got to the body how many persons were there?

A. Well, as near as I can remember there was no one standing close by except the conductor, who called my attention to this.

Q. What was his name?

A. Conductor Bavington.

Q. There was no other person right close to the body?

A. Not that I remember of.

166 Q. Did you see the undertaker there?

A. Yes, sir, he came.

Q. He came after you did?

A. Yes, sir.

Q. Did you see the Justice of the Peace or Coroner?

A. I saw Mr. Smith there, yes, sir.

Q. He came after you did?

A. Yes, sir.

Q. At the time you went there where was the engine and cars that ran over him standing?

A. North of him.

Q. About how far?

A. I could not say as to that.

Q. As much as two or three car lengths?

A. I could not say, because I don't know how far it was.

Q. Did you see Mr. George Wallace in the cab?

A. No, I have no recollection of seeing him in the cab.

Q. Did you see Mr. Vick Reems in the cab?

A. No, sir.

Q. Did you see Mr. Portelle or George Kendrick on or about the train?

A. Not at that time, no.

Q. I will ask you if you saw George Wallace, Victor Reems, Mr. Portelle or Mr. Kendrick standing around among those who were standing in close to the body?

A. I remember seeing them there, but I don't remember who they were talking with.

Q. I will ask you if you went up to the body and looked at it?

A. Yes, sir.

167 Q. In what manner was it lying?

A. If I remember correctly, he was lying with his face down with his hands out, and one foot over the rail I believe was cut off. That is as near as I can remember.

Q. Which way was the head?

A. East.

Q. And the foot cut off where was it?

A. On the west rail.

Q. Was there any injury to the head?

A. Yes, sir.

Q. By what rail was that injury done?

A. Well, I don't know what track it was; it was the rail east of where his body was lying.

Q. It was the rail of the same track was it?

A. Yes, sir.

Q. The east rail of the same track was it?

A. Yes, sir.

Q. How many persons were there when you got there?

A. As near as I can remember there was no one but the Conductor.

Q. Were there other persons standing farther away?

A. There was people coming from all directions.

Q. But you were among the first to get there?

A. Yes, sir, I was.

Q. As you approached, did you see the Conductor touch the body?

A. I did not.

Q. Did you notice anybody touch the body?

A. No, sir.

Q. I will ask you if from the position of the body you can testify whether it was touched by anybody after the train ran over it?

A. I saw no one touch it.

168 Q. You saw it very shortly after he was killed?

A. As soon as I could get there, yes, sir.

Q. Did you see the engine #2113 or 2131 and the cars that were attached to it stop?

A. No, sir, I have no recollection of that.

Q. Did you hear them stop?

A. Well, no.

Q. Did you hear them stop twice?

A. No, sir, I have no recollection of that.

Q. Did you hear them stop and start?

A. I have no recollection of that.

By Jno. C. Moore: "That is all."

## Recross-examination.

By W. H. Moore:

Q. Who gave you the information in regard to some one being killed down there?

By the Witness:

A. Mr. Bavington.

Q. Did he come to the depot there?

A. Yes, sir.

Q. Did he go back with you?

A. No, sir, ahead of me.

Q. How long after he gave you the information did you go over?

A. Well, I could not say; it could not have been longer than two or three minutes.

By W. H. Moore: "That is all."

Witness excused.

169 J. J. RAWLINS, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

## Direct examination.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. J. J. Rawlins.

Q. What is your occupation?

A. Engineer—locomotive engine-r.

Q. How long have you been in that service?

A. Thirty years.

Q. Of what Company are you an employe?

A. The Rock Island.

Q. I will ask you what was your service on the 29th day of July, 1912, Sunday, the day William L. Turner was killed, if you can remember?

A. I don't work on Sundays; I was at home.

Q. What engine did you have charge of at that time; that is, those weeks?

A. Engine #1222.

Q. What is the kind of engine?

A. She is what we call a simple engine.

Q. What were its duties?

A. She done the switching here in the yards and went to Billings and back.

Q. There were no other duties for that engine to perform?

A. Only in cases of emergency.

170 Q. I will ask you if you can remember if you were doing switching in the yard or if you had gone to Billings and back on the 28th of July, 1912?

A. No, I was not working that day; if it was on Sunday I was not working.

Q. I will ask you if there was any more than one switch engine in use in Enid at that time?

A. No, sir.

Q. If there was any switching done at that time it was not this engine?

A. No, it was by a road engine. We work six days in the week and then we lay over on Sunday, and on Sunday the road engines usually do their own switching.

Q. Did you know George Wallace at that time?

A. Yes, sir.

Q. Do you know what engine he was running at that time?

A. No, sir, I do not. They run the engines as they want them and the men take their turns.

Q. Road engines that run freight trains have a certain series of numbers by which you can tell whether it is a road engine or not by number?

A. Not necessarily; sometimes they take the engines for switch engines, the 1200 class, that is a smaller engine than a road engine; sometimes they work them in the yard and sometimes on the road; the 2100 class they don't work as switch engines only in transit along the line if a train comes over and stops and they have any cars to set out they do it with that engine; they don't use them as switch engines.

Q. The 2100 class is a road engine?

A. Yes, sir.

171 Q. And it is not used for switching purposes except for its own use?

A. That is it.

Q. If engine 2113 pulled into Enid on the 28th day of July, 1912 it pulled in as a road engine, did it?

A. Yes, sir.

Q. If it came from the north where would be the point of origination of a train pulled by that engine?

By W. H. Moore: We object as incompetent, irrelevant and immaterial and asking for a conclusion of the witness.

By the Court: If he knows.

By W. H. Moore: Defendant excepts.

By the Witness:

A. Where the train would originate you mean?

By Jno. C. Moore:

Q. Yes, sir.

A. They make the train up at Caldwell, Kansas; and they have through loads for different points south leaving Caldwell, and probably they will have their stuff along to set out and the balance go on, and as they reduce along the line, if there is cars to go they pick them up to replace the ones that they set out so that they will

have their tonnage, and El Reno would be the destination of that crew.

Q. Starting from where?

A. Caldwell, Kansas.

Q. Then when 2100 came in here its destination was El Reno and it came from Caldwell?

A. Yes, sir.

172 Q. Now, you say you have had thirty years' experience as an engineer?

A. Yes, sir.

Q. I will ask you if an engine of the type of 2113 with its tender and two box cars loaded and a flat car loaded are backing on a track at the rate of ten miles an hour, in what distance could that train be stopped if the full air was applied?

A. Well, it would depend on circumstances and the condition of your brakes; if your brakes were in proper condition on the three cars and the locomotive going ten miles an hour, it would stop in sixty feet.

Q. In sixty feet?

A. Yes, sir.

Q. If the brakes were in good working order?

A. Yes, sir.

Q. Now I will ask you in what distance it would take to stop that train if they were going five miles an hour?

A. Well, you could just cut it in two; if you are going five miles an hour you could probably stop in thirty feet if everything was in working condition, if the rail was in good condition so that the wheels would not slide and everything favorable, it might go a little further or not quite so far you know.

Q. In case the train was going at fifteen miles an hour and the air was applied to all the wheels, how far would it run before stopping?

A. Just increase the distance of stoppage at the same rate.

173 Q. So there is a kind of rule there about that?

A. Yes. After you get above a certain speed, of course, your brakes will take hold, but it don't have the effect on them after you get to 45 or 50 miles an hour, as long as you are between 20 and 25 the momentum of the train going 45 or 60 miles an hour has a greater tendency to pull in your brakes but they would be a little harder to stop in going 15 or 20.

Q. I will ask you what would be the distance according to your knowledge if the train was proceeding at the speed of 25 miles an hour?

A. Well, it would be a little harder, the resistance, the momentum of the train; the resistance would be as great but don't take effect on account of the motion of the train quite as quick as it would at ten miles an hour, and consequently, would go more than as far again probably as it would ten or twelve miles an hour—not very much though.

Q. Well, a train running then at ten miles an hour and applying the brakes should stop at sixty feet?

A. Yes, it should stop within sixty feet or near about that; that is if it is put on with full force.

Q. Did you know Mr. Turner during his life time?

A. Yes, sir.

Q. How long have you known him?

A. I judge about six or seven years as near as I can remember.

Q. You knew the character or service and labor he was performing?

A. Yes, sir, he was contractor for the Company, I believe, to shovel their coal out of the cars into the chutes; he was at Caldwell; he had charge of Caldwell, Enid and Dover for awhile.

174 Q. This was company coal that he was handling, was it?

A. Yes, sir, I think so.

Q. Were you with him at any time he was performing his labors?

A. Oh, I could see him every day.

Q. I will ask you what you know about his coopering cars in the yard?

By W. H. Moore: This is all covered by contract, and there is no dispute but what he did the work.

By the Court: I don't see the materiality of it.

By W. H. Moore: We don't deny that he did the work.

By the Court: Well, they can show affirmatively that he did the work; objection over-ruled. Exception allowed.

By the Witness:

A. The coopering of cars was to get them in condition to haul grain in them; they have some burlap and also they have some pieces of board to put over the holes where there is any hole in the car, and then side them up to the top of the door and leave a hole so that the spout would go in between the roof and the door, and then they put burlap in there to keep the grain from running out of any hole; the jostle of the cars, if there is a little hole, the grain runs out.

By Jno. C. Moore:

Q. Did you see Turner performing those duties?

A. No, I have seen him with the material, but I never was in the car and seen him working.

175 Q. Did you see him at the chutes?

A. Yes, sir.

Q. Did you occasionally take coal from the chutes?

A. Every day.

Q. And that engine every day except Sundays ran to Billings?

A. Yes, sir. I mean every day except Sundays, and some Sundays I have worked.

Q. Have you any recollection of Train 95 coming as an extra on the 28th of July, 1912?

A. No, sir, I was not at the depot that day.

By Jno. C. Moore: That is all.



Cross-examination.

By W. M. Moore:

Q. How long have you known George Wallace?

By the Witness:

A. For about nine or ten years.

Q. There are a good many things in running an engine that enter into how long it will take it to stop?

A. Yes, sir.

Q. Those engines backing up in that way, suppose the engine had behind it a box car and a flat car loaded with machinery and was backing, the engineer in order to keep a look-out would be required to look away out of his window?

A. Yes, sir.

Q. Where would his air be on a 2100 engine?

A. Those engines are equipped with the straight air and automatic also, but I think he has a New York brake valve and would have to reach over to get it.

176 Q. And if his train was backing he would be looking back this way. (Indicating by looking backward.)

A. If he was going north he would be doing like this (Indicating) with his hand this way (Indicating) to get hold of the brake valve.

Q. Suppose that train as I have described, a 2113 engine, with a loaded box car and a flat car loaded with threshing machinery headed south was backing on to track two at the rate of eight or ten miles an hour, with a brakeman riding on the corner of the flat car, the engineer riding as you have described leaning out of his window looking backward, and supposing he would get a stop signal followed almost instantly by a violent stop signal; that in response to the first signal he would grab his air and throw it into a service stop and then into the emergency, how far would you say that train would run before it stopped?

A. It takes time to do all this—

Q. Tell the jury how long it would take him to see those signals and understand them and make the application and stop his train?

A. It would take him almost as long as it would to stop it; because, if he got a stop sign or anything like that, when you put the emergency on you are liable to tear off your brake or jerk somebody off.

Q. When an engineer coming under these conditions driving down on track 2—How is that signal given?

A. They generally give both hands.

Q. Suppose I am riding like this and I give him that (Indicating by arms) that is a stop signal?

A. Yes, sir.

177 Q. Now then unless there was something about that signal, unless it is violent or something of that kind—

A. If it was like that (Indicating violently with arms) you would know there was something wrong.

Q. An ordinary stop signal would the engineer throw it into the emergency?

A. No, sir, there is orders not to do it, because so many are jerked off; if a man gives an emergency stop he is looking for it and is braced.

Q. Let me give you this condition: Suppose this train was coming down as I have told you, one flat car and a box car, loaded, with a brakeman sitting on the corner of the flat car, and as the man in front of the car steps on to the rail, suppose a step over, the brakeman gives it to the engineer like that (indicating violent stop signal) how far would that train run before it would stop?

A. It is not a matter of minutes when a train is moving how far it will go, it is a matter of second-, and it takes so many seconds to get to it; it takes so many seconds to do this work, and would probably travel ten or fifteen feet—ten feet, say, before the brakes would take hold and after the brakes are on it ought not to go over two car lengths or such a matter.

Q. Suppose you were on an engine of that kind, a 2100 engine, with a loaded box and a flat car, and a man would step on your track 50 to 75 feet in front of the train, you going ten miles an hour, and the brakeman would give you a stop signal as soon as he realized the man's danger, what are your chances to save hitting that man if he stays on the track?

A. Well, the chances are that a man might accidentally stop if everything was working right as it should work, if his brakes  
178 on the engine were working and the man was 50 or 75 feet away, you could probably get stopped may be; but you cannot always tell, you know, how long it is from the time that the signal is given or whether it is realized and whether it is handled like it would be handled in a case of emergency.

Q. Suppose that you were running an engine, you were sitting in your cab, and you know there is to be a test made, you know a man standing down there is going to give you a signal and you are watching for it, you can stop your train much quicker under those circumstances than you can where the emergency jumps before you all at once?

A. Yes, sir, if you know what you are going to do and when to do it.

Q. Have you had any experience in accidents of this kind?

A. I never hit a man in my life.

Q. You never hit a man in your life in your thirty years?

A. No, sir.

Q. When these accidents of this kind happen, it is a very startling thing to see a man come in front of your train like that?

A. Yes, sir.

Q. Very often when that happens, when a man steps in front of a train, if a man's nerves are not unusually steady it will be a second or two before he steadies himself down to do the necessary thing, is that true?

A. Yes, sir. I had two little children playing at the side of the track out this side of Mountain View; I was coming along and they were playing at the side of the track; they heard me coming, and they lived on the other side of the creek and they jumped on the

track and started to run across that bridge—I expect there is a man here who was on the train, Teddy O'Brian, foreman of the bridge gang—those two little children, a little boy and a little girl, probably seven and nine years old, started to run across that railroad bridge and I didn't think there was any possible show for me to stop, and they could not go to one side of the track because they were over the creek, but just as soon as I saw them start across the bridge, I slammed the emergency on and put the engine to the back motion on sand, and I ran out on the pilot and stood on like this (Indicating) and I got up as close as from me to the Judge (Five feet) and she stopped I was going to catch the little girl. I was not a bit excited until the little girl ran across the bridge, and after I stood there for a minute, I was so nervous I could hardly crawl into my engine.

Q. This case that you have just told about when you stopped within eight or ten feet of the children, suppose a man had seen that instead of you seeing it and had to give you a signal.

A. I would have ran over them.

Q. You would have run over them in spite of the world?

A. Yes, sir.

By W. H. Moore: That is all.

Redirect examination.

By Jno. C. Moore:

Q. The effect of a dangerous position is to give you the nerve to act immediately?

By the Witness:

A. Yes, sir.

180 Q. Isn't that the effect upon men in general?

A. Yes, sir, but if you see anything with your own eyes it makes it different.

Q. For the person who does see the danger?

A. It is bound to unnerve you.

Q. It didn't unnerve you to take care of those children?

A. Not until afterwards.

Q. When he sees the danger he begins to act?

A. You have got to act in cases of that kind every day; the public don't know what an engineer has got to do, for the minute you quit watching that minute you are going to get into trouble; you cannot quit watching.

Recross-examination.

By W. H. Moore:

Q. Isn't it a question of split seconds in those cases lots of times?

By the Witness:

A. Yes, indeed. Lots of times you cannot act quick enough, going 50 or 60 miles an hour.

By W. H. Moore: That is all.

Witness excused.

181 W. C. ROGERS, a witness of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows:

Direct examination.

By Jno. C. Moore:

Q. State your name.

By the Witness:

A. W. C. Rogers.

Q. Where are you living?

A. In Enid.

Q. What official position, if any, do you hold?

A. I am City Clerk.

Q. As City Clerk are you custodian of the laws and ordinances of the City of Enid?

A. Yes, sir.

Q. What is it that you have in your hand, the ordinances of the City of Enid?

A. The ordinance book up to 1910, yes, sir.

Q. Do you mean that the publication of the ordinances was in 1910?

A. Revised ordinances of the City of Enid, Oklahoma, to 1910.

Q. The ordinances contained in that book are still in force, are they?

A. Most of them are.

Q. I will ask you if the book which you hold in your hand contains an ordinance regulating the running of trains in the City of Enid?

A. Yes, sir.

182 Q. Is that ordinance still in force?

A. Yes, sir.

Q. I will ask you to turn to the ordinance regulating the running of trains in the City of Enid?

A. I have it. (Exhibiting book.)

By Jno. C. Moore: I offer the ordinance in evidence.

By W. H. Moore: We object as incompetent, irrelevant and immaterial, not properly identified.

By the Court:

Q. By what authority was that book published, do you know?

By the Witness:

A. The Council ordered it done by the City Attorney and his law partner.

By W. H. Moore: I don't believe that is the way to prove a City ordinance.

By the Court: No, that is not the way.

By Jno. C. Moore:

Q. I will ask you, Mr. Rogers, if the volume that I hold in my hand the Revised Ordinances of the City of Enid, Garfield County, Oklahoma, is the revised and codified ordinances under the supervision of the ordinance committee and of the City Attorney of the City of Enid?

By Mr. Curran: We object as not the best evidence.

By the Court: The minutes of the Council authorizing the City Attorney to do that would be the best evidence. Is there any serious controversy about this?

By Jno. C. Moore: In the first place the Court takes judicial cognizance of the city.

By W. H. Moore: You don't need to prove it if the Court takes judicial notice of it.

By Jno. C. Moore: We need to prove the ordinances but we don't need to prove anything regarding the city.

(Thereupon, the Court examines Sec. 5106 Laws of Oklahoma, 1910.)

By the Court: "In the 27th Oklahoma it says courts in civil cases will not take judicial notice of city ordinances.

(Court examines printed ordinance book produced by witness.)

By the Court: I think you will have to get the ordinances authorizing them to do that before this book will be admissible.

By Jno. C. Moore: Mr. Rogers, I will ask you to bring everything to the Court or proceeding of the Mayor and Council and any ordinance or resolution of the Mayor and Council directing the printing of this instrument as the ordinances of the City. I will excuse you at this time to bring these things into Court.

By W. H. Moore: We ask also that he bring the original ordinance book and the minutes showing the passage of the ordinances.

Witness excused.

184 B. M. TANNER, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. B. M. Tanner.

Q. Where do you live?

A. At the Oxford Hotel, Enid.

Q. How long have you lived in Enid?

A. Two days.

Q. You recently came here?

A. Day before yesterday.

Q. What business are you engaged in here?

A. I am Superintendent of the Metropolitan Life Insurance Company here.

Q. As such Superintendent I will ask you if you have in your possession or under your control the table of the American experience of the expectancy of life?

A. I have.

Q. That table is published and used by the Metropolitan Life Insurance Company?

A. Yes, sir. (Exhibiting book.)

Q. I will ask you what the little volume is that you have presented here?

A. The volume is a rate book for the Metropolitan Life Insurance Company.

Q. And upon it the Metropolitan Life Insurance Company fixes rates for insurance based upon the American tables?

A. Yes, sir.

185 Q. Which page of the book contains the table?

A. 356.

Q. Is that the last page of the volume?

A. The last page, yes, sir.

By Jno. C. Moore: I wish to introduce the last page of the mortality table in evidence.

Cross-examination.

By W. H. Moore:

Q. That table that you have there has written at the top of it "American Experience Table"?

By the Witness:

A. Yes, sir.

Q. Have you compared that with the experience table as they appear in the Encyclopedia?

A. I have.

Q. You know that to be correct?

A. Yes, sir.

Q. How many tables are there?

A. I know of three.

Q. What are they?

A. There is an actuaries table—

Q. How is that made up?

A. The actuaries table is made up by the experience of actuaries in American and foreign insurance companies.

Q. They include the expectancy of men who can obtain insurance in that company?

A. Yes, sir.

186 Q. It does not include men who are precluded from insurance?

A. None of the tables contain information except those who can secure insurance.

Q. What is the other one?

A. There is one called the Combined Table.

Q. Then the American Table?

A. Yes, sir.

Q. They have a Carlisle Table?

A. There may be.

Q. What table did you compare that with?

A. I got it from the publishers of the Spectator Company, and in fact any insurance encyclopedia will give the different tables. I have compared it with the Spectator Publishing Company's table in New York.

Q. What is that?

A. It is an insurance publication and stands to the insurance world as Dunn's and Bradstreet's do to the commercial world.

By the Court:

Q. Did you ever hear of the Bowdit Table?

A. No, sir.

By W. H. Moore:

Q. You are satisfied that that table printed in that little book is an exact copy of the American Experience Table as printed in the Standard Encyclopedias?

By the Witness:

A. I am.

By W. H. Moore: There is no objection.

Witness excused.

187 By Jno. C. Moore: Before offering the data from this book, I wish to call Mrs. Turner for one question.

Mrs. W. L. TURNER, a witness, of lawful age, being first duly sworn by the Clerk of the Court, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. You are the widow of the deceased, Wm. L. Turner?

By the Witness:

A. Yes, sir.

Q. State the date of his birth?

A. He was born January 4, 1866.

Q. When did he die?

A. July 28th, 1912.

Witness excused.

B. M. TANNER, a witness of lawful age, being recalled as a witness for Plaintiff, testified on oath as follows:

By Jno. C. Moore:

Q. Mr. Tanner, kindly read into the record the expectancy of the deceased, Wm. L. Turner, founded upon those dates of his birth and death?

By the Witness:

A. That age would be 46; and the expectation of life given as 23 years and 295 days.

By Jno. C. Moore: That is all.

Witness excused.

188 W. M. HUTCHINSON, a witness, of lawful age, being first duly sworn, and being recalled as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. Mr. Hutchinson, you may state when you and Mr. Turner heard the whistle of Train 24, what Mr. Turner did and said?

By Mr. Moore: May it be understood that this all goes in subject to our objection. We object as incompetent, irrelevant and immaterial, calling for a conversation with the deceased not in the presence of the defendant and no part of the res geste.

By the Court: Objection over-ruled, and admitted for the purpose of explaining his conduct in going across the tracks of the defendant.

By W. H. Moore: To which the defendant excepts. And it is understood that as the other questions of this character come in that the same objection goes to it.

By the Court: Very well. I think the form of that question might be changed a little; what, if anything did he do; it might be admissible as verbal acts.

By Jno. C. Moore:

Q. State when you and Mr. Turner heard train 24 whistle for the station, what did Mr. Turner do, if anything?

189 By the Witness:

A. He pulled out his watch and said "There is 24; I will have to take my tickets to the freight depot and go and order coal for the chutes".

Q. Which way did he go then?

A. He turned around and walked back west towards the freight depot.

Q. I will ask you when you came to the first row of cars through



which you passed over the bumpers, if you noticed how far south that row of cars extended?

A. No, sir, I didn't notice it exactly how far it extended.

Q. They extended far enough however that you concluded to go between the bumpers rather than go around it?

A. Yes, sir.

Q. I will ask you when you came to the next row of cars how far south that row extended?

A. Well, sir, I never paid any attention to how far it extended.

Q. Did it extend farther south than the first row of cars?

A. I could not say exactly, but it extended quite a ways.

Q. It extended however far enough south that you concluded to go across the bumpers rather than to go around it?

A. Yes, sir.

Q. I will ask you when you came to the third row of cars how far south that row of cars extended?

A. I never paid no attention to how far south it extended.

Q. Did it extend so far south that you concluded to go through the bumpers rather than go around them?

A. Yes, sir.

Q. I will ask you which of these three rows of cars extended the farthest south?

A. Well, sir, I believe the first row extended the farthest.

190 By the Court:

Q. Do you mean the east row?

By the Witness:

A. Yes, sir.

By Jno. C. Moore:

Q. But still the other rows extended sufficiently far that you concluded to go between the bumpers rather than go around them?

A. Yes, sir.

Q. Now, if Mr. Turner didn't go between the bumpers but went around those trains of cars, would that with your knowledge of the extent of that row of cars have caused him to be farther south than the north end of the freight depot?

A. Yes, sir.

Q. When you went to the body where Mr. Turner lay did you notice any cars upon the house track next to the freight depot?

A. Yes, sir, there was cars.

Q. I will ask you if any of those cars extended farther north than the platform of the freight house?

A. Yes, sir, they extended about two or three cars.

Q. In order to reach the freight depot it would be necessary then for Mr. Turner to go south farther north than the point where his body lay, is that right?

A. Yes, sir.

## Cross-examination.

By W. H. Moore:

Q. Where was the body of Mr. Turner lying with reference to the freight depot?

By the Witness:

A. He was laying east of the freight depot.

Q. Any south of the north end of the freight depot?

A. Well, sir, I could not just positively say.

191 Q. He was east of the freight depot and you don't know whether he was north or south of the north line of the depot?

A. No, sir, I could not positively say that.

Q. What is your best judgment?

A. Well, as near as I could judge I would think it was lying about opposite the center of the freight depot.

Q. Are you well enough acquainted with the lay of the land there to give us some idea how far that would be from the water crane, give your best judgment—from the water crane to where he was lying?

A. Well, I don't know exactly, but I have an idea it was better than 500 feet, just guessing at it.

Q. Something near 500 feet?

A. Something like that.

Q. What kind of a pipe was he smoking that after-noon.

A. Well, sir, he had a meerschaum pipe.

Q. Did you see the pipe lying there on the ground?

A. Yes, sir.

Q. That was a meerschaum pipe that you saw him light?

A. Yes, sir.

By W. H. Moore: "That is all".

Witness excused.

By the Court: Gentlemen of the Jury: It is now about twelve o'clock and we will take a recess until one o'clock. There are some jurors here who want to go home on that train and we will adjourn this afternoon at 3:40. In order to save a little time we will adjourn until one o'clock. Gentlemen of the Jury, in the mean time don't talk about the case on trial either among yourselves or with any other person, and do not remain in the presence or hearing of any one discussing the case, and be in your seats at one o'clock p. m.

Thereupon, the Court takes a recess until one o'clock.

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Afternoon Session, November 29, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of one o'clock P. M. of this day, viz., November 29, 1913, pursuant to recess heretofore taken, with the Honorable James W. Steen sitting as Judge of said Court, Geo. M. Seifres, Clerk and W. R. Le Compte, Reporter; the Administrator

herein is present in person and by counsel, Jno. C. Moore, and the defendant is present by its counsel, W. H. Moore and John F. Curran. The jury is present in a body in the jury box, and it is admitted by counsel for plaintiff and defendant that the jury sworn in this cause is all present.

Thereupon, the trial of this cause is resumed and the following proceedings had, to-wit:

W. C. ROGERS, a witness, of lawful age, having been first duly sworn by the Clerk, and being recalled as a witness upon the part of plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. Now, Mr. Rogers, if you have the ordinances of the City of Enid, the original ordinance fixing the running of trains within the City limits, you may produce them?

By the Witness:

A. Yes, sir, I have them. (Witness produces books.)

Q. What book is it that you have in your hand?

A. Council Proceedings of the City of Enid, Book No. 2.

By Jno. C. Moore: I will ask the Stenographer to identify the instrument as Exhibit C.

Book marked Exhibit C.

193 By Jno. C. Moore:

Q. I ask you to state what Exhibit C is?

By the Witness:

A. Ordinance No. 152, "an ordinance regulating the running of railway engines, cars and trucks within the limits of the City of Enid, and to govern the speed thereof, and to prevent accidents, and to prohibit the obstruction of streets, cross-walks and side walks and providing penalties for violations."

Q. I will ask you if that ordinance is signed by the Mayor and City Clerk and bears the seal of the City?

A. Yes, sir.

Q. Is that duly authenticated?

A. Yes, sir.

Q. I will ask you to look at the record, Council Proceedings No. 2 of the City of Enid and read into the record, if any such there be, the proceedings of the City Council and the passage of that ordinance?

By the Court: You have read nothing but the title of this ordinance and that does not prove anything.

By Jno. C. Moore: I was going to prove the passage of the ordinance and then introduce the ordinances.

By the Court: All right; is there any objection as to the passage of them?

By Mr. W. H. Moore: Not at this time.

By the Court:

Q. Is that a certified copy?

By the Witness:

A. It is the original ordinances.

194 By Jno. C. Moore:

Q. You may take the Journal book No. 2 and read from the journal all the several steps taken by the City Council and the Mayor in the passage of Ordinance No. 152; I ask you to read the proceedings of each meeting to show who was present as officers of the City in the passage of the ordinance?

By the Witness:

A. (Reading from Juornal 2, pages 205 to 209, City of Enid:)

"COUNCIL CHAMBER, ENID, O. T.,  
January 17, 1900.

Council met in adjourned session January 17, 1900, Mayor Meibergen presiding.

Roll call showed the following members present: Councilmen: Arrowsmith, Diehl, Frantz, Gannon, Henry, Kershaw and White; Councilmen, Fenlon, Luft and Millard were absent.

Minutes of adjourned meeting of January 15, 1900 read and approved as read.

Under the head of Ordinances the following proceedings were had:

\* \* \* \* \*

Ordinance No. 152 was read.

Moved and seconded that the rules be suspended and that Ordinance No. 152 be passed to its second reading and adopted by title. Motion prevailed by a unanimous vote.

Title was read: 'An Ordinance regulating the running of railway engines, cars and trucks within the limits of the City of Enid and to govern the speed thereof, and to prevent accidents, and to prohibit the obstruction of streets, cross-walks and side walks and providing penalties for violations.'

195 Moved and seconded that title be adopted as read. Motion prevailed.

Moved and seconded that the rules be suspended and that Ordinance No. 152 be passed to its third reading and adopted by section. Motion prevailed by a unanimous vote.

Section One was read.

Moved and seconded that Section One be adopted as read. Motion prevailed.

Section Two was read.

Moved and seconded that Section Two be adopted as read. Motion prevailed.

Section Three was read.

Moved and seconded that Section Three be adopted as read. Motion prevailed.

Section Four was read.

Moved and seconded that Section 4 be adopted as read. Motion prevailed.

Section Five was read.

Moved and seconded that Section 5 be adopted as read. Motion prevailed.

Moved and seconded that Ordinance No. 152 be adopted as a whole. The roll call showed the following vote:

Those voting "yes" for the ordinance were: Councilmen Arrow-smith, Diehl, Frantz, Gannon, Henry, Kershaw and White.

Councilmen Fenlon, Luft and Millard were absent.

The Mayor announced that Ordinance No. 152 was adopted.

By Jno. C. Moore:

Q. Have you any order of publication of that ordinance?

A. I don't know that I understand that.

196 Q. Was there any order made there ordering the ordinance to be published in a newspaper?

A. The ordinances are all published. Section 5 of the ordinance says "This ordinance shall take effect and be in force from and after its passage, approval and publication. Passed and approved this 17th day of January, 1900."

By Jno. C. Moore: I now offer Ordinance 152 in evidence.

By W. H. Moore: To which the defendant objects as incompetent, irrelevant and immaterial.

By the Court: Over-ruled.

By W. H. Moore: Exception.

By Jno. C. Moore:

Q. Read the ordinance to the jury?

By the Witness (reading from city records):

Ordinance No. 152 (or Ex. C).

A. "An Ordinance regulating the running of railway engines, cars and trucks within the limits of the City of Enid, and to govern the speed thereof, and to prevent accidents, and to prohibit the obstruction of streets, cross-walks and side-walks and providing penalties for violations.

Be it ordained by the Mayor and Councilmen of the City of Enid, Oklahoma Territory:

Section 1. It shall be unlawful for any person or persons, or any railroad or railway company, or corporation, to move, propel or drive, or to cause to be moved, propelled or driven any railroad car, truck or locomotive engine by means of steam or other locomotive power, on any portion of any railroad within the corporate limits of the City of Enid at a rate of speed exceeding  
197 ten miles an hour.

Section two. It shall be unlawful for any person or persons, company, or corporation to obstruct the free use and passage of any street, avenue, cross-walk or side-walk for a period longer than five (5) minutes by means of any railroad car, truck or locomotive engine.

Section Three. It shall be unlawful for any person, persons or corporation controlling, managing or operating any railroad or line of railroad passing through or into the City of Enid to cause or permit its train-, engines or cars to cross any street of the City of Enid without giving notice of its approach by continuously ringing the bell for a distance of not less than two hundred feet from said street crossing and until the engine shall have passed over the said street.

Section Four. A violation of any of the provisions of this ordinance shall be punishable upon conviction thereof in the police court of said City by a fine of not less than ten dollars nor more than one hundred dollars.

Section Five. This ordinance shall take effect and be in force from and after its passage, approval and publication. Passed and approved this 17th day of January, 1900.

JOSEPH MEIBERGEN, *Mayor*.

Attest:

[SEAL.] J. S. SHUMAKE,  
*City Clerk.*

By Jno. C. Moore:

Q. Now, I will ask you if in the publication attached thereto that ordinance has been published in a newspaper?

By the Witness:

A. Yes, sir.

198 Q. Have you compared the newspaper print with the original ordinance to which it is attached?

A. No, sir.

Q. Will you do that and state whether the publication is of the ordinance itself?

A. (Examining and comparing papers:) Yes, sir.

Q. I will ask you now to read the affidavit of publication attached thereto?

A. (Reading:)

"E. P. Moore, being duly sworn, deposes and says that he is the publisher of the Garfield County Democrat, a weekly newspaper published at Enid, Garfield County, Oklahoma Territory, and of general circulation therein, and that the attached notice was published in said Garfield County Democrat wholly and in a regular edition, and not in a supplement, for a period of one consecutive week; that the first publication was on the 8th day of March, 1900; that the last publication was on —.

E. P. MOORE.

Subscribed and sworn to before me this 10th day of March,  
A. D., 1900.

[SEAL.]

J. S. SHUMAKER,  
*Notary Public.*

My Commission expires March 22, 1901.

Q. I will ask you if that ordinance is published by the city in the book of ordinances?

A. Yes, sir.

Q. Have you with you the book of ordinances published by the City?

A. Yes, sir.

199 Q. I will ask you to refer to the book and state whether that ordinance has ever been amended or repealed?

By W. H. Moore:

The defendant objects; he has the same printed ordinance book that he had this morning that the Court ruled out.

By the Court:

I don't see your object in doing that; the presumption is it is in force and it is left with them to show a different state of facts if they can.

By Jno. C. Moore:

Q. I will ask you if you have with you an ordinance defining the limits of the City of Enid?

By the Witness:

A. Yes, sir.

Q. You may produce it if you please? (Witness produces original ordinance which is by the Reporter marked Exhibit "D") State what the instrument, Exhibit D, is?

A. An ordinance defining and establishing the corporate limits and boundaries of the City of Enid, Garfield County, Oklahoma.

Q. What is the date of that ordinance?

A. Passed and approved the 26th day of February, 1910.

Q. Is there attached to that ordinance the signature of the Mayor and the City Clerk and the seal of the City?

A. Yes, sir.

Q. I will ask you if there is attached thereto also the proof of its publication?

A. Yes, sir.

Q. Have you compared the publication with the ordinance itself?

A. Yes, sir, it is a part of the ordinance. It was compared at the office; the original proof of publication was lost off and it was compared.

200 Q. I will ask you now to refer to the minutes of the proceedings of the Mayor and City Council or of the Mayor and Commissioners, as the case may be, regarding the passage of that ordinance. (Exhibiting books.) What is the book you have in your hand?

A. Journal No. 7 of the City of Enid.

Q. Refer to the pages and name them as you go on showing the proceedings of the adoption of that ordinance?

A. Page 261—

Q. Read who was present?

A. (Reading from City Journal No. 7:)

"CITY HALL, February 26, 1910.

The Board of Commissioners met in adjourned session; Mayor Randolph presiding. Roll call showing all members present. Ordinance No. 676 was now read. Whereupon, it was moved and seconded that the rules be suspended and Ordinance No. 676 advanced to its second reading and adopted by title. Motion carried.

Title was now read. "An Ordinance defining and establishing the corporate limits and boundaries of the City of Enid, Garfield County, Oklahoma."

Moved and seconded that the title be adopted as read.

Motion carried.

Moved and seconded that the rules be suspended and that Ordinance No. 676 be advanced to its third reading and adopted by sections. Motion carried.

Upon motions duly made and seconded and carried Sections One and Two were read and adopted as read.

Moved and seconded that Ordinance No. 676 be adopted as a whole, members voting by roll call.

201 Roll call showing all members voting unanimously in favor thereof.

Moved and seconded that the same be declared an emergency, members voting by roll call.

Roll call showing all members voting unanimously in favor thereof.

The Mayor announced ordinance No. 676 adopted.

\* \* \* \* \*

Moved and seconded to adjourn. Motion carried.

C. F. RANDOLPH, Mayor.

Attest:

\_\_\_\_\_,  
City Clerk.

By Jno. C. Moore:

Q. I now call your attention to the publication and will have you to read the affidavit of publication thereto?

By the Witness (reading from city records):

A. "William M. Taylor, of lawful age, being duly sworn, upon his oath, says: That he is manager of the Enid Eagle, a daily newspaper published at Enid, in Garfield County Oklahoma, and of general circulation in said County and State, and that the attached copy of Ordinance No. 676 was published in the regular edition and not in a supplement thereof, for two consecutive issues, the



first publication being on the 27th day of February, 1910, and the last on the 28th day of February, 1910.

WILLIAM M. TAYLOR.

Subscribed and sworn to before me this 28th day of November, 1913.

[SEAL.]

M. L. BISHOP,  
*Notary Public.*"

202 By Jno. C. Moore: Plaintiff now offers in evidence Ordinance No. 676.

By W. H. Moore: To which the defendant objects as incompetent, irrelevant and immaterial; it was passed some time after this other ordinance; one ordinance was passed in 1900 and the other in 1910.

By the Court: Objection overruled. This ordinance is introduced, I suppose, for the purpose of showing that the yards of the defendant are within the City limits. Exception allowed.

By W. H. Moore: Exception.

By Jno. C. Moore:

Q. You may now read Ordinance No. 676, being Exhibit D, to the Jury?

By the Witness:

A. (Reading original Ordinance No. 676 of the City of Enid, Oklahoma, from the records of said City:)

#### EXHIBIT D.

##### *Ordinance No. 676.*

"An ordinance Defining and Establishing the Corporate Limits and Boundaries of the City of Enid, Garfield County, Oklahoma.

Be it ordained by the Mayor and Commissioners of the City of Enid, Oklahoma:

That the corporate limits and boundaries of the City of Enid is and the same are hereby defined and established as follows: to-wit:

203 Section One. Beginning at the north-west corner of Section 6, Township 22, Range 6, W. I. M., thence south on the section line between Section 6-22-6 and 1-22-7 to the north line of the right of way of the St. Louis and San Francisco R. R. where said right of way line extends through 1-22-7; thence in a south-westerly direction on said line 950 feet, thence north 300 feet; thence west on a line parallel to and 500 feet from the section line between Sections 1-22-7 and 12-22-7 to the intersection of said line with the north right of way line of the Avard Division of the St. Louis and San Francisco R. R., thence in a northwesterly

direction on said right of way line to a point at the intersection of said north right of way line to a line 552 feet west of and parallel to the north and south half section line through 1-22-7; thence south on said line to its intersection with the section line between 1-22-7 and 12-22-7; thence west to the north-west corner of Hardin Addition; thence south 660 feet, thence west to the north-west corner of Bon View Second Addition; (thence south to the south-west corner of Bon View Second Addition) thence east 674.8 feet; thence south 630 feet; thence west 330 feet; thence south 660 feet to the half section line, east and west through 12-22-7; thence east on the half section line to its intersection with the north-west right of way line of the St. Louis and San Francisco R. R.; thence south-west on said right of way line to its intersection with the section line between 11-22-7 and 12-22-7; thence south on said line to the corner of Sections 11-12 and 13-14-22-7; thence east on the section line to the corner of 12 and 13-22-7 and 7-18, 22-6; thence south on section line between 13-22-7 and 18-22-6 to the corner of

204      Section 18 and 19-22-6 and 13-14-22-7; thence east on section line between 18-22-6 and 19-22-6 to the south-west corner of the south-east quarter of Section 18-22-6; thence north on half section line to the south-west corner of Garfield Addition; thence east on the south line of said Garfield Addition to the intersection with the section line between 18-22-6 and 17-22-6; thence north on section line to the north-east corner of Garfield Addition; thence west to the south-east corner of South Park Add.; thence north to the east line of South Park Addition to the section line between Section- (17) 7-22-6 and 18-22-6; thence east on said section line to the north-west corner of East Park Addition; thence south on section line between 18-22-6 and 17-22-6 to the south-west corner of East Park Addition; thence east on half section line east and west through Section 17-22-6 to the center of Section 17-22-6; thence north on Section line 9 half) to the section line between 8-22-6 and 17-22-6; thence east on Section line between section- 8 and 17 and 9 and 16-22-6 to the corner of section 9-10-15 and 16-22-6; this being the south-east corner of University Place (Replat) Addition; thence north on section line between Sections 9 and 10 and the north-east corner of University Place Addition; thence east on half section line east and west through section 10-22-6 to the section line between 10 and 11-22-6; thence north on section line to the north-east corner of College Hill Second Addition; thence west on section line between 3 and 10-22-6 to the corners of 3-4, 9 and 10-22-6; thence north on section line between sections 3 and 4-22-6 to the corner of section- 3, 4-22-6 and 33 and 34-23-6; thence west on section line between 4-22-6 and 33-23-6 to the north-west corner of Cloworth (Second replat) Addition; thence south on half section line north and south through 4-22-6 to the north right of way line of the St. Louis and San Francisco R. R.; thence west on said right of way line to its intersection

205      tion with the half section line east and west through section 5-22-6; thence west on said half section line to the section line between section 5-22-6 and 6-22-6; thence north on said sec-

tion to the north-east corner of Rock Island Addition; thence west on the north line of Rock Island Addition and Midway Addition to the north-west corner of Midway Addition; thence south one-fourth of a mile, thence west one-fourth of a mile to the section line between 31-23-6 and 36-23-7; thence south on said section line to the south-west corner of Midway Addition, this being the point of beginning.

Section Two. By reason of the fact that this ordinance includes within the boundary herein fixed certain tracts of land that have not heretofore been in the city limits and of which the plats have only recently been filed in the office of the Register of Deeds, so that this ordinance could not have been passed before this time, and unless said ordinance is effective by the first day of March, 1910, so that the additional property included may be certified by the City Clerk to the County Clerk to be extended on the tax rolls for city revenue, the city will lose large sums of revenue to which it is entitled this year, and the city has not at this time sufficient revenue for the general running expenses incurred by it, an emergency is hereby declared to exist for the immediate preservation of the public peace and safety, so that this ordinance shall take effect and be in force from and after its passage, approval and publication.

Passed and approved this 26th day of February, 1910.

C. F. RANDOLPH, *Mayor*.

Attest:

[SEAL.] E. R. LEE, *City Clerk*.

206 By Jno. C. Moore: Now, if the Court please, the Court Reporter has taken down both ordinances into the record, and I suggest that the witness, instead of leaving these documents with the Stenographer, shall be permitted to carry them back to his office.

By the Court: "He will be permitted to do so."

By W. H. Moore: "We have no objection."

By the Court: "The ordinances having been read into the record in the presence and hearing of the jury, the witness will be permitted to take with him to his office the documents and books of the city offered in evidence."

Cross-examination.

By W. H. Moore:

Q. In your examination of the records of Enid have you discovered any other ordinance covering the operation of trains within the city limits besides No. 152?

By the Witness:

A. No.

Q. Have you made a search of the record to see?

A. I looked through this morning to see and I did not find it.

Q. When did the Commission form of government go into effect in Enid?

A. It went into effect on the 21st or 22nd day of December, 1909.

By W. H. Moore: That is all.

Witness excused.

207 By Jno. C. Moore: Plaintiff now offers in evidence the deposition of Hess Conway, taken on Saturday, the 18th day of October, 1913, before C. F. Chapman, Notary Public for Creek County, Oklahoma, in the City of Sapulpa, and which deposition was filed in this Court on the 20th day of November, 1913, the defendant being present by attorney, Mr. Gamble, and notice of the taking of said deposition being acknowledged by defendant's attorneys, Roberts and Curran on the 14th day of October, 1913.

Which said deposition of Hess Conway, as here offered and read in evidence to the jury by Jno. C. Moore, omitting the notice herein referred to, is in the words and figures following, viz:

208

*Deposition of Hess Conway.*

Depositions of witnesses taken to be used in an action pending in the District Court of the Twentieth Judicial District of Oklahoma, in and for Garfield County, Oklahoma, wherein A. P. Bond, Administrator of the Estate of William L. Turner, deceased, is plaintiff and Chicago, Rock Island and Pacific Railway Company, a corporation, is defendant, in pursuance with the notice hereto attached and at the time and place therein stated.

The said A. P. Bond, Administrator, plaintiff, appeared by John C. Moore, his attorney, and the said Chicago, Rock Island and Pacific Railway Company, defendant, by J. G. Gamble, its attorney; and thereupon the said plaintiff produced the following witnesses in order, to-wit:

HESS CONWAY, of lawful age, who being first duly sworn, deposeth and saith:

Direct examination.

By John C. Moore:

Q. State your name?

A. Hess Conway.

Q. Did you know William L. Turner at Enid?

A. I did.

Q. Do you remember about his being killed there on Sunday, July 28th of last year?

A. I do.

Q. What were you doing that afternoon?

(Objected to by J. G. Gamble, attorney for defendant, as being incompetent, irrelevant and immaterial.)

By the Court (at trial): "Objection overruled; exception allowed."

By the Witness:

A. I was shoveling coal on the chutes.

Q. For whom?

A. Mr. Turner.

209 Q. Did you see him that afternoon?

(Objected to as calling for irrelevant and immaterial evidence.)

By the Court: "Overruled." (At trial.)

By Mr. W. H. Moore: "Defendant excepts." (At trial.)

A. I did not see him until I got my car emptied. I had it all out before I seen him.

(Defendant moves for the exclusion of the testimony for the reason that it is irrelevant to any of the issues in this case.)

By the Court: "Motion refused; exception allowed."

Q. Where did you see him?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Objection over-ruled."

By W. H. Moore (at trial): "Defendant excepts."

A. I went up to where he and Mr. Neelson was loading a car of coal, they was loading a car of coal for the mill. They were loading a car of coal right between the Texas Oil House and the Ice Plant.

Q. What, if anything, did you say to Mr. Turner about the car of coal on the chutes being all unloaded?

(Defendant objects for the reason that the question calls for irrelevant, incompetent testimony, because it seeks to elicit a conversation with a dead man had in the absence of the defendant or any of its agents, because it is not a part of the res gestae and because the question is leading and suggestive.)

By the Court (at trial): Objection over-ruled.

By W. H. Moore (at trial): "Defendant except."

A. I told him that it was all unloaded.

(Defendant moves the exclusion of the answer of the witness upon the same ground assigned to the last preceding question.)

By the Court (at trial): "Over-ruled."

By W. H. Moore (at trial): "Exception".

210 Q. Were there more than one car of coal on the chutes at that time?

(Defendant objects as calling for irrelevant and immaterial testimony.)

By the Court (at trial): "Over-ruled."

By W. H. Moore (at trial): Exception.

A. No, sir, there was not but the one car up there.

Q. Do you know when it was set on the chutes?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Over-ruled".

By W. H. Moore (at trial:): "Exception".

A. No, sir, I do not know when it was set.

Q. When you told Turner that the coal was all unloaded, what did he say and what did he do?

(Defendant objects as calling for incompetent, irrelevant and immaterial evidence; because the question seeks to elicit a self-serving declaration with a dead man not had in the presence of the defendant or any of its agents; because the question calls for matters not properly a part of the *res gestæ*.)

By the Court (at trial): "Objection sustained".

By Jno C. Moore: "Plaintiff excepts". (At trial.)

A. (Not read to the jury.) Well, he said "I will go down and gather up the tickets and order a car of coal for the morning".

Q. What did he do?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Over-ruled".

By W. H. Moore (at trial:): "Exception".

A. He just started down the car towards the chutes; he stepped out of sight; I did not know where he went after he went out of my sight.

211 Q. Are you acquainted with a passenger train called Number 24?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Over-ruled".

By W. H. Moore: "Defendant excepts".

A. I am.

Q. Was this conversation with Turner and his going away towards the chutes before or after Number 24 arrived that evening?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Over-ruled."

By W. H. Moore: "Exception".

A. Before.

Q. Did you see Turner's body after he was killed?

A. I did.

Q. Did you see the cars and the engine that ran over him and killed him?

A. I seen the engine and cars that they told me run over him.

(The defendant moves the exclusion of the answer of the witness for the reason that it is incompetent, irrelevant and immaterial as evidence, and also based upon hear-say.)

By the Court (at trial): "Sustained".

Q. Did you see the engine and cars standing on the same track on which his body lay?

(Defendant objects as irrelevant and immaterial.)

By the Court (at trial): "Over-ruled."

By W. H. Moore: "Exception".

A. I did.

Q. Which way from him?

A. North.

212 Q. About how far?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court (at trial): "Over-ruled".

A. It was just about four or five car lengths.

Q. Which way was the engine facing?

A. South.

Q. Were there any cars in front of the engine and between it and Turner's body?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court (At trial:) Over-ruled; exception allowed.

A. No, sir.

Q. Can you describe how the body lay?

(Objected to as calling for irrelevant and immaterial evidence.)

By the Court (At trial:) "Over-ruled".

A. Yes, sir.

Q. You may state regarding it? How it lay and in what manner it was injured?

(Objected to as calling for irrelevant and immaterial evidence by defendant.)

By the Court (At trial:) Over-ruled; exception allowed.

A. Well, sir, he fell with his face downward and just the top of his head was cut off and one foot was off.

(Defendant moves the exclusion of the answer of the witness for the reason that it is irrelevant and immaterial).

By the Court: "Motion refused."

213 Q. On which rail was his head injured?

(Defendant objects on the ground of irrelevant and immaterial evidence, calling for a conclusion of the witness without facts stated in support thereof.)

By the Court (at trial:) "Over-ruled; exception allowed."

A. The east rail.

Q. On which rail was his foot cut off?

(Objected to by defendant as calling for irrelevant and immaterial evidence, for the conclusion of the witness without facts in support thereof.)

By the Court (at trial:) "Over-ruled."

A. The west rail.

Q. Where was the foot lying with reference to the rail?

(Objected to by defendant for the reason that it calls for irrelevant and immaterial evidence.)

By the Court (at trial:) "Over-ruled."

A. On the west side of the rail.

Q. I will ask you to state if any portion of his head lay on the east side of the rail?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court (at trial:) Over-ruled; exception allowed."

A. I did not see any laying there because I did not go around there on the east side of him.

Q. How far towards the eyes and the ears was the head injured?

(Objected to, calling for irrelevant and immaterial evidence.)

By the Court (at trial:) "Over-ruled.)

A. Down towards the eyes and ears I could not tell you because he lay on his face and I did not see that part.

214 Q. Was the top of his head still attached or had it been crushed away?

(Objected to by defendant as irrelevant and immaterial.)

By the Court (at trial:) Over-ruled; exception allowed.

A. Why, it had been crushed away.

Q. How long had you known Turner?

A. I had known him for twenty-eight months.

Q. What was his physical condition and health?

(Objected to by defendant as calling for irrelevant and immaterial evidence, for the conclusion of the witness without facts shown in support thereof, for the opinion of the witness without his having been shown qualified.)

By the Court (at trial:) Over-ruled; exception allowed.

A. Good.

Cross-examination by J. G. Gamble:

Q. Who were you working for on July 28th, 1912?

A. Mr. Turner.

Q. Who paid you for your work in unloading coal on the chutes at Enid?

A. Mr. Turner did up to that time.

Q. Under whose directions were you working on July 28th, 1912?

A. Mr. Turner's.

Q. How long had you been working for Mr. Turner prior to that time?

A. Ever since July 2nd.

Q. Of the same year?

A. Yes, sir.

Q. Did you continue working on the chutes at Enid after Mr. Turner's death?



A. Yes, sir.

Q. For how long did you so continue?

A. All thru August.

215 Q. Please state when and how many cars of coal were set to the chutes at Enid immediately before Mr. Turner was killed. By immediately, I mean the last time before he was killed?

A. I do not know when, I know how many.

Q. When and how many cars of coal were set to the chutes after Mr. Turner's death?

(Plaintiff objects because it is an unlimited time, indefinite, uncertain, incompetent, irrelevant and immaterial.)

By the Court (at trial:) "Sustained."

A. (Not read to jury.) I could not tell. After he was killed I could not tell.

Q. Can you tell the first time when any coal was set to the chutes after Mr. Turner's death?

A. Monday morning.

Q. At what time on Monday morning?

(Objected to by plaintiff as immaterial.)

By the Court (at trial:) "Over-ruled."

A. It was set before seven.

Q. I will ask you to state if it is not a fact that at the time Turner was killed there were cars containing coal on the chutes of the defendant at Enid.

A. No, sir.

Q. I will ask you to state if it is not a fact that no coal other than what was on the chutes at the time Turner was killed was set to the chutes for a period of at least two days after he was killed?

(Objected to by plaintiff as immaterial.)

By the Court (at trial:) "Sustained."

A. No, sir; there was coal set there Monday morning. (This last answer not read to jury, objection being sustained.)

216 Q. How much coal was there in the pockets of the chutes at the time Turner was killed?

(Objected to by plaintiff as immaterial.)

By the Court (at trial:) "Over-ruled."

A. I could not tell just how much there was in the chute; I know how much I throwed out of the car Sunday.

Q. Was the pockets full or empty?

A. Most of them was empty.

Q. How many pockets to the chutes?

A. Twenty-two; there is eleven on each side, double chutes.

Q. How many of those twenty-two pockets had coal in them?

(Objected to as immaterial.)

By Jno. C. Moore (at trial:) "Objection with-drawn."

A. No, I could not tell how many pockets had coal in them, be-

cause I do not know how much they had in them when I commenced.

Q. How much coal did you unload that day?

A. I throwed out about twenty tons.

Q. Did you see Turner when he was killed?

A. No, sir.

Q. You do not know of your own knowledge what part of the engine struck him?

A. No, sir.

Q. About what time was it that you first saw his body?

A. Why, it was after twenty-four had come in.

Q. How long thereafter?

A. I could not tell exactly how long afterwards.

Q. Did you go up to where his body lay?

A. Yes, sir.

Q. Was there any one else there at his body at the time you arrived?

A. Yes, sir.

217 Q. Do you know whether or not the engine and cars to which you referred had been moved after Turner was struck, and before you saw them?

A. I could not tell.

Q. They might have been moved then?

(Objected to by plaintiff as calling for an opinion and not evidence at all.)

By the Court (at trial:) "Over-ruled."

By Jno. C. Moore (at trial:) "Exception."

A. They might have been.

Q. Do you know whether or not Turner's body had been moved any way after he was struck and before you saw him?

A. No, sir, I don't.

Q. It might have been moved then, might it not?

A. As far as I know.

Q. As far as you know what?

A. It might have been moved.

Q. What time of the evening did you finish unloading the car of coal on the chutes?

A. Directly after four o'clock.

Q. Did you go immediately to where Turner was and hold the conversation with him that you have stated?

A. I did.

(Signed)

HESS CONWAY.

Both parties now announce that this is all the testimony they care to offer.

Subscribed and sworn to before me this 18th day of Oct., 1913.

[SEAL.]

C. F. CHAPMAN,  
Notary Public.

My commission expires Apr. 19th, 1914.

218 I, C. F. Chapman, Notary Public in and for Creek County, Oklahoma, do hereby certify that the above named Hess Conway, the witness whose name is subscribed to the foregoing deposition was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, and that the deposition by him subscribed was reduced to writing by me, a disinterested and qualified person, and was subscribed by him in my presence; and that the same was taken on the 18th day of Oct., 1913, between the hours of eight o'clock, a. m. and six o'clock, p. m. of said day, and at the office of C. F. Chapman, in the City of Sapulpa, County of Creek, State of Oklahoma, as specified in the notice hereto attached, and that I am not attorney for either of the said parties, or otherwise interested in the event of this action.

[SEAL.]

(Signed)

C. F. CHAPMAN,  
Notary Public.

My commission expires Apr. 19th, 1914.

## Fees charged:

Original .....	\$5.15
One copy .....	2.02
One witness .....	1.00
	<hr/>
	\$8.17

10-22-13. Rec'd \$5.30 to apply from att'y for Plaintiff.

C. F. CHAPMAN.

Filed Nov. 20, 1913. Geo. M. Seifres, Clerk District Court.

219 *Notice to Take Deposition.*

(Attached to Deposition of Hess Conway.)

In the District Court of the Twentieth Judicial District of the  
State of Oklahoma in and for Garfield County.

No. 1452.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

The said Chicago, Rock Island and Pacific Railway Company, a corporation, and its attorney of record, C. O. Blake, J. G. Gamble and Robberts and Curran, will take notice that on Saturday, the 18 day of October, A. D., 1913, the plaintiff above named will take the Deposition of sundry witnesses to be used as evidence in the trial of the above cause, at the office of C. F. Chapman, in the City of

Sapulpa, in the County of Creek, in the State of Oklahoma, between the hours of eight o'clock, a. m. and six o'clock, p. m. of said day, and that the taking of the same will be adjourned and continued from day to day, at the same place and between the same hours, until they are completed.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Service of the above notice is hereby acknowledged to have been made on this 14 day of October, 1913.

ROBERTS AND CURRAN,  
*Attorneys for Defendant.*

220 Mrs. W. L. TURNER (Ida Turner), a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. I will ask you, Mrs. Turner, if you are the widow of William L. Turner, deceased?

By the Witness:

A. I am.

Q. And the mother of the children?

A. Yes, sir.

Q. You may state when Mr. Turner was born?

A. He was born January 4th, 1866.

Q. You may state when you were born?

A. I was born August 29th, 1872.

Q. You may state the date of Vera's birth?

A. Vera was born on the 22nd day of January; she will be seventeen this coming January; I cannot state the year without figuring it up.

Q. You may give the date of Mary's birth?

A. Mary was born on the 26th day of January.

Q. What year—or how old will she be next January.

A. She will be twelve years old on the 26th of January.

Q. You may state the date of Dorothy's birth?

A. The 23rd day of September. She will be ten next September; she is nine this year.

Q. She was nine last September?

A. Yes, sir.

221 Q. You may state the date of Willie's birth?

A. He was born on the 10th day of July, and is seven years old last July.

Q. You may state the date of Bessie's birth?

A. Bessie was born on June 11th.

Q. How old is she now?

A. She was six in June.

Q. You may state the date of Austin's birth?

A. Austin was born May 22, 1912.

Q. How old was he when his father was killed?

A. Two months and eight days.

Q. They are all living, are they?

A. Yes, sir.

Q. Living with you?

A. Yes, sir.

Q. You have their care and management, have you?

A. Yes, sir.

Q. You may state what time you and Mr. Turner moved to Enid?

A. Well, it was in September, I think, 1906, but I am not positive whether it was 1906 or 1907.

Q. Where had you lived prior to that time?

A. At Dover, Oklahoma.

Q. Was he in the service of the railway company at Dover?

A. Yes, sir, he was.

Q. And continued in the service of the Company here?

A. Yes, sir.

Q. I will ask you if you know about what his earnings were annually, from his service with the railway company and other labor that he performed?

By Mr. Gamble: We object as incompetent, irrelevant and immaterial.

222 By the Court: Over-ruled.

By Mr. Gamble: "Defendant excepts."

By the Witness:

A. Yes, sir.

By John C. Moore:

Q. About how much was it?

By Mr. Gamble: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the Witness:

A. On an average of \$125.00 a month.

By Jno. C. Moore:

Q. \$125.00 a month?

A. Yes, sir.

Q. What did he do with that money?

A. He gave the most of it to me for the support of the family.

Q. What did you do with it?

A. Well, I paid grocery bills and house rent and used it for such things as is usually needed in a large family.

Q. About how much annually, how much a year did you expend on the family while he was alive?

A. Well, I would say in the neighborhood of \$1,300.00 to \$1,500.00.

Q. What was the real average annually that you were expending in support of the family out of the moneys that he gave you?

A. Well, as near as I could say, it would be about \$1,300.00.

223 Q. Now, did you expend that money for the benefit of all these children that I have mentioned besides yourself?

A. Yes, sir, I did, on the children and myself.

Q. I will ask you if you can remember about in what proportion, whether you could divide it up so as to tell approximately about how much you spent for each one?

By Mr. Gamble: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the Witness:

A. Well, I could not say exactly.

By Jno. C. Moore:

Q. You have studied that subject some lately, have you?

A. Yes, sir, I have tried to figure out about what was spent on each one for clothing and such like.

Q. Did you take into consideration in making that estimate the groceries that were bought?

A. Yes, sir, I took in groceries, house rent, clothing and such things as it takes for the family.

Q. Did you take into consideration telephone bills?

A. Yes, sir.

Q. And gas?

A. Yes, sir.

Q. Water rent and taxes on property and the cost of clothing?

A. Yes, sir.

Q. And school books?

A. Yes, sir.

Q. And beds and bedding?

A. Yes, sir.

224 Q. And tables, chairs, queensware, cups, saucers, knives, forks and supplies for the household generally?

A. Yes, sir, I did, because I was the one that bought all those things.

Q. Now, Mrs. Turner, as near as you can determine from the difference of your situation and the difference of the situation of the children, their ages, their needs, etc., about how much do you believe you have expended a week for yourself?

By Mr. Gamble: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: The Supreme Court of the United States has held under this Federal Statute that there must be a recovery for the individual member. Objection over-ruled; exception allowed.

By Mr. Gamble: Exception.

By the Court: I confess I don't see the necessity of it under our Statute.

By Jno. C. Moore: There is not under our Statute, but under the decision of the Supreme Court of the United States in the case of Michigan Central Railway Company against Vreeland, 227, U. S. and the American Railroad Company vs. Deitrickson, 227 U. S.—

By the Court: Do they hold that a state court is bound to make that distribution?

225 By Jno. C. Moore: They hold that the jury must make the distribution.

By the Court: Go ahead.

By Jno. C. Moore:

Q. About what was your weekly expenditure on yourself?

By the Witness:

A. About \$6.75 per week; that includes everything.

Q. That includes your clothing and garments of all characters?

A. Yes, sir.

Q. Did that include your insurance dues?

A. Yes, sir, it does.

Q. And all character of expense for yourself?

A. Yes, sir.

Q. You say Vera is about seventeen years old?

A. She will be next January.

Q. What do you consider that you have to expend for her?

By Mr. Gamble: We object as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the Witness:

A. It costs as much for Vera as for myself.

By Jno. C. Moore:

Q. In estimating for each of the children you have considered doctor bills along with everything else?

A. Yes, sir, doctors and medicine, school books and things too numerous to mention.

Q. What about these expenses, as near as you can recall, that you have made weekly for Mary?

By Mr. Gamble: We object as incompetent, irrelevant and immaterial.

226 By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the Witness:

A. \$3.50 per week.

By Jno. C. Moore:

Q. What do you say as to Mary?

A. About \$3.50 a week.

Q. And what about Dorothy?

A. Well, I put hers at \$2.80 a week.

Q. And what about Willie?

A. \$2.50 per week.

Q. What about Bessie?

A. \$2.30 per week.

Q. And what about Austin, the baby?

A. \$2.00 a week.

By Jno. C. Moore: That is all.

Cross-examination.

By Mr. Gamble:

Q. Mrs. Turner, you say your husband's salary was on an average of \$125.00 a month?

By the Witness:

A. Yes, sir.

Q. From whom did he draw his salary?

A. He drew part of it from the Rock Island Railway Company, and then he worked for the Enid Ice and Fuel Company, the white mill, Grubb and Purmort and the Arctic Ice Company.

Q. Do you know how much salary he drew from the Rock Island Railway Company?

A. I have part of his vouchers and also the expenses of the men, but for most of the men he kept a little book and kept his accounts in that.

227 Q. Did he have any stated salary with the railway company?

A. No, sir, he handled coal by the ton.

Q. Some months it was greater than others?

A. It depended on what the tonnage was.

Q. Can you tell me how much it was for the month of June, 1912?

A. Do you mean what the coal voucher was?

Q. Yes, madam?

A. I don't know that I know exactly; that was paid after his death. (Examining paper.)

Q. Was it paid to you?

A. No, sir, it was not paid to me directly. It was paid to Mr. Edmondson. He furnished the money to pay the bills and all the indebtedness, and he drew these vouchers.

Q. You don't know how much that was?

A. No, I have one voucher listed for June of \$138.00, but I don't know whether that was June, 1912, or the year before.

Q. Do you know whether or not he owed any of his helpers for their services for the month of June?



A. No, sir, I don't think he did.

Q. Did he have helpers during the month of June, 1912?

A. I don't think he had over one man.

Q. He paid him though?

A. Yes, sir.

Q. And that would come out of this voucher?

A. He would either pay it out of his coal voucher or the extra work he did for the other parties. You see their work was cash and he generally used that to pay these men.

Q. In reaching your conclusion that he received so much money you have taken into consideration all the work he did?

A. Yes, sir.

228 Q. And the profits he realized from the work of other people?

A. Yes, sir; he always tabulated what he made for the coal, for the transfer work, for the cooorage of cars, for the Enid Ice and Fuel Company, Grubb and Purmort and the Arctic Ice Company; he would put down the earnings from all these and *the* subtract the cost of his labor.

Q. You have stated as his average earnings, his profits and all that business?

A. His profits, yes, sir.

Q. You say in reaching your conclusions as to the disbursement of this property that you have taken into consideration the taxes on property?

A. We have no property; we always paid house rent up to the time he was killed.

Q. He worked under a contract did he not?

A. Yes, sir; but the transfer work he received that in a check from the Rock Island freight Agent. That was not under any contract; his June check for his extra work in 1912 was \$72.28.

Q. How much of that did he pay out for labor?

A. He only had one man helping him.

Q. How much did he pay him?

A. \$2.00 a day.

Q. Did he work every day?

A. No; whenever he would need him he would call him; he didn't work straight time.

Q. You don't know how much of that \$72 was afterwards paid out for labor, do you, for the month of June?

A. No, he settled with the men himself, and it was just for the July labor that I settled for after his death. June had been paid.

229 Q. Do you know how much his May check was from the Rock Island in 1912?

A. No, sir, I could not tell you.

Q. Have you any idea?

A. No, I haven't the least idea; I can give you the vouchers for 1910 straight through.

Q. From 1910 to 1912?

A. No, from 1910 to 1911, for the year; I have them here in a

book. He covered these little books and kept his work in it and whenever one was full he threw it away.

Q. You have no record of the amount of money which he earned by his own labor and that of others during the year 1912?

A. No.

Q. Have you any record of the amount of money he expended for labor during that year?

A. Not for 1912; he did most of his own work.

Q. How much money did he give you in June, 1912?

A. \$115.00.

Q. All at one time?

A. No, not at one time; he gave me the grocery bill and the lodge dues and meat bill.

Q. How much did he give you in May, 1912?

A. About \$115.00.

Q. Have you any record to show the receipt of that money by you from him?

A. I haven't all the receipts; the grocery bill we took these coupon books and destroyed them; I have house rent receipts and such as that.

Q. You don't know how much you spent on yourself during those months?

A. No, I could not state exactly; I always bought all of our clothes for myself and children.

Q. The amounts you have stated are estimates of your expenses?

230 Q. The amounts you have stated are mere estimates of your expenditures?

A. Yes, sir.

By Mr. Gamble: That is all.

Witness excused.

231 GEORGE E. WALLACE, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

Direct examination.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. George E. Wallace.

Q. Where do you live?

A. El Reno, Oklahoma.

Q. Are you in the service of the Chicago, Rock Island and Pacific Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Engineer.

Q. Were you in the service of the Company on the 28th day of July, 1912?

A. Yes, sir.

Q. In what capacity at that time?

A. As engineer.

Q. Do you remember of coming into Enid on that day?

A. Yes, sir.

Q. Where did you come from?

A. Caldwell, Kansas.

Q. Did you bring a train down?

A. Yes, sir.

Q. Were you the engineer of that engine that brought the train?

A. Yes, sir.

Q. What was the number of that engine?

A. #2113.

Q. I will ask you, Mr. Wallace, where was the destination you were going to at that time?

A. Our expectations were to go to El Reno, Oklahoma.

232 Q. That was the destination intended?

A. Yes, sir.

Q. Did you uncouple from the train when you reached the Enid yards and run off down to the south side of the yards and the south end of the switch yards?

A. Yes, sir, there was work done; I cannot recall the movements exactly.

Q. You went down there?

A. Yes, sir.

Q. How much of the train went with you down there?

A. Well, the first switch that was made a portion of the train was put down on track No. One.

Q. Did you push your engine and some cars up on to track two?

A. We used track two coming from the south end of the yard with cars back of the engine.

Q. How many cars?

A. Two.

Q. What kind of cars were they?

A. The car attached to the engine was a box car; the next car was a flat car.

Q. Did you have a tender attached to your engine?

A. Yes, sir.

Cross-examination.

By W. H. Moore:

Q. When you came to the Enid yards you came in at the north end?

By the Witness:

A. Yes, sir.

Q. And when you went with your engine to the south end of the yards what cars, if any, did you take, if you remember?

A. I cannot recall the first work that was done.

233 Q. Where did you get the box car and the flat car that you were pushing as you came in on track Number Two?

A. It seems to me those cars were switched out and held on to on account of being set-out cars enroute.

Q. When you started in on track number two, which way was the pilot of your engine?

A. The engine was headed south.

Q. Where were these cars, on which side of the engine?

A. To the north of the engine.

Q. Your engine then was backing as you came in on Number two?

A. Yes, sir.

Q. The box car was next to the engine, then came the flat car?

A. Yes, sir.

Q. What, if anything, was on that flat car?

A. It was partly loaded with machinery.

Q. Who was your brakeman on that trip?

A. Portelle and Kendrick.

Q. As you started in on track two, what brakemen were on your train?

A. Portelle and Kendrick.

Q. Were both of them on your train when you started in the lead?

A. Yes, sir.

Q. Or did one of them get on later?

A. They were both on the car leaving the south end of track two.

Q. Can you tell approximately how far it is from the lead in on track two to the freight house?

A. No, sir, I could not give you the exact distance.

Q. As you came up track two what were you doing?

A. I was on my engine in the engineer's position.

234 Q. What is the engineer's position?

By Jno. C. Moore: Plaintiff objects as not proper cross-examination. I confined my examination of this witness to a very brief matter, and he is their servant.

By the Court: Sustained as not proper cross-examination. Anything you want to examine him about as to the character of the train you are at liberty to do so. Objection sustained.

By W. H. Moore: "Exception."

By W. H. Moore: Under that ruling of the Court, I have nothing further to ask the witness at this time.

Witness excused.

By John C. Moore: The plaintiff rests.

235 By the Court:

GENTLEMEN OF THE JURY: As far as you are concerned, we will excuse you at this time. You have heard all the evidence offered in chief by the plaintiff in support of their contention, but you are not to make up your minds as to the merits of the case until you have

heard the evidence of the defendant, the rebuttal evidence, the charge of the Court and the arguments of counsel presenting their respective theories of the case. You should keep your minds in a condition to receive the defendant's evidence the same as you have received the plaintiff's evidence, and you should not allow yourselves to be influenced by what you have heard to the exclusion of a proper consideration of the defendant's evidence. Of course, you will retain the evidence of the plaintiff in your minds, and that offered by the defendant, and after you have heard the instructions of the Court and the arguments, you will be permitted to retire and reach your conclusion.

You will be excused until next Monday morning at ten o'clock; and in the mean time you will not talk to any person about any phase of the case, either among yourselves or with any other person, and do not remain in the presence or hearing of any person discussing the case; and if any person attempts to discuss the case in your presence, inform them that you are a juror, and if they persist in talking to you about it, take their names and report them to the Court.

We will not meet until ten o'clock next Monday morning, (December 1, 1913) and I would like to have you in your seats in the jury box at that time.

Thereupon, the jury sworn and accepted as the trial jury in this cause, retires from the court room.

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*Demurrer to Plaintiff's Evidence.*

By W. H. Moore: Comes now the defendant at the close of the plaintiff's evidence and demurs to the same, for the reason that said evidence is not sufficient to entitle the plaintiff to a verdict against the defendant, whereof the defendant prays the judgment of the Court.

By Jno. C. Moore: If the Court please, I did not know that any further action would be taken in the case at this time, and I find that I have over-looked a matter, and I ask that the plaintiff be allowed to withdraw the announcement that we have rested and that the case be re-opened for the purpose of introducing this evidence which I forgot to read.

By the Court: The jury has been discharged now, and we can take that up later; I would like to hear you on the demurrer anyhow.

By Jno. C. Moore: I would like to say as far as the demurrer is devoted to the question of an independent contractor, that my brief is not in the court room at this time, and I would have to go and get it, but beyond the matter briefed, I would like to call the attention of the Court to certain things.

By the Court: I would like to hear from both sides as to just your positions in the matter. I will not pass on the demurrer until Monday anyhow.

237 Thereupon, the Court hears the arguments of counsel for plaintiff and defendant on the demurrer of defendant to plaintiff's testimony.

Thereupon, by order of court, the district court of Garfield County, Oklahoma, takes a recess until Monday, December 1, 1913, at the hour of ten o'clock, a. m. of said day.

238 Morning Session, Monday, December 1, 1913.

Thereupon, the District Court of Garfield County, State of Oklahoma, convened at the hour of ten o'clock, a. m. of this day, viz., Monday, December 1, 1913, at the court house in the City of Enid, said County and State, with the Honorable James W. Steen sitting as Judge of said Court, Geo. M. Scifres, Clerk, and W. R. Le Compte as Reporter. The plaintiff, the Administrator herein, is present in person and by counsel, John C. Moore, and the defendant is present by its counsel, W. H. Moore, John F. Curran and J. G. Gamble. The jury empaneled and sworn to try the issues in this cause is present in a body in the jury box, and by order of Court, the jury is polled by the Clerk of the Court and each juror answers "Present" as his name is called, and they are all present.

Thereupon, the trial of this cause is resumed and the following proceedings had, viz:

By the Court: The demurrer of the defendant to the evidence of the plaintiff will be over-ruled and an exception allowed.

By John C. Moore: I spoke to the Court after the jury was discharged Saturday afternoon that I wanted to introduce two or three little points which we had over-looked, before we officially rest our case.

By the Court: Very well; the plaintiff's announcement that they have rested is with-drawn then.

239 GEORGE W. BOND, a witness of lawful age, having been first duly sworn by the Clerk, and being recalled as a witness upon the part of plaintiff, testified as follows, to-wit:

Examination by John C. Moore:

By the Court: It cropped out that those coal tickets were simply memorandums, and is there *any* proof that after they were sent in that they were preserved?

By John C. Moore: Possibly not that they were preserved, although they were files of the Company.

By W. H. Moore: They are temporary records and we cannot get them.

By John C. Moore:

Q. I will ask you, Mr. Bond, if on the evening that Mr. Turner was killed, after his being killed, if you looked into the coal ticket boxes?

By the Witness, Geo. W. Bond:

A. Yes, sir.

Q. Did you see any tickets there?

A. Yes, sir; there was as many as two tickets in the north end box. I never looked into but one box.

Q. You had been working for Turner shoveling coal?

A. Yes, sir.

Q. Do you know how much coal a day was being taken away from there by engines?

A. I suppose about 75 or 80 tons a day.

Q. I will ask you to state the average?

By W. H. Moore: We object as incompetent, irrelevant and immaterial; the question is, how much was taken on this day, and it being Sunday, there was no engines working there, and we ask that the last answer be withdrawn.

By the Court: It is with-drawn.

(Thereupon, by request of counsel, the above question, viz: "Do you know how much coal a day was being taken away from there by engines?" was read to the witness by the Reporter.)

By the Witness:

A. I don't know for certain how much they did use per day, but I judge 75 or 80 tons a day.

By W. H. Moore: Defendant asks that that answer be stricken.

By the Court: Yes, sir, that is withdrawn from the jury.

By John C. Moore:

Q. You do know it was not less than 70 or 80 tons a day, do you not?

By W. H. Moore: Defendant objects as incompetent and irrelevant and leading.

By the Court: Sustained.

By Jno. C. Moore:

Q. You yourself didn't have charge of the delivery of coal to engines, did you?

By the Witness:

A. I did when Mr. Turner was not there.

Q. During the time you did have charge, how many tons were taken daily?

241 By W. H. Moore: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By W. H. Moore: "Exception."

By the Witness:

A. I don't know exactly how to tell that, but I suppose it was about 75 or 80 tons a day.

By W. H. Moore: Defendant moves that the answer be stricken, if your honor please.

By the Court: The answer will be stricken.

By the Court:

Q. State your best judgment as to the amount taken a day when you were at work?

By the Witness:

A. About seventy-five or eighty tons a day.

Q. Do you know how much was taken on this Sunday?

A. No, sir.

By Jno. C. Moore:

Q. Seventy-five or eighty tons a day was an average, was it not?

A. That is what I judge it to be, about an average.

Q. Now, I will ask you about how much on an average an engine took from the coal chutes?

A. Well, it took from two to eight tons; some of them two and some of them as high as eight tons.

Q. What was the average, about?

A. I suppose they averaged about five tons.

By Jno. C. Moore: That is all.

242 By W. H. Moore: The sheets that we turned over to Mr. Moore on your honor's order are not here, and we will excuse the witness until they are here and with the right to re-call him.

243 Witness excused.

A. P. BOND, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows:

Direct examination.

By Jno. C. Moore:

Q. You may state your name?

By the Witness:

A. A. P. Bond.

Q. Are you the plaintiff in this suit?

A. Yes, sir.

Q. The Administrator of the Estate of William L. Turner, deceased?

A. Yes, sir.

Q. What has been your occupation for several years passed?

A. Well, for the last twelve years my occupation has been rail-roading, principally, for the Rock Island Company.

Q. In your experience as a railroad man have you discovered the length of an engine, a number 2100, that is used by the Rock Island Railroad with its cars?

A. Yes, I have looked at many of them.

Q. Have you discovered the length of such engines?

A. Well, I have it pretty well fixed in my mind by observation.

Q. Do you know what the length of a 2100 engine is?



A. Not exactly.

Q. Do you know very closely?

A. I think I do.

Q. You may state what the length of a 2100 engine is with its tender?

A. Well, take a 2100 with the pilot, the engine and the tender will cover between seventy-five and eighty feet to the best of my judgment.

244 Q. On what do you base your judgment as to that length?

A. Well, I have turned a great many engines of all lengths and sizes on our turn-table at Chickasha, and it is 75 feet in length and I have observed it took the entire length of the turn table to turn an engine.

Q. I will ask you if you know what the length of standard box cars are?

A. Yes, sir, I think so.

Q. What is the length?

A. The standard runs from 34 feet to 40 feet; including 34, 36 and 38 and 40, and 40 is the standard.

Q. Do you know what is the length of flat cars?

A. Well, they run the same way.

Q. What is the distance between the two rails of a track, if you know?

A. Yes, sir, I know exactly.

Q. What is it?

A. Four feet, 8½ inches.

By Jno. C. Moore: Take the witness.

By W. H. Moore: No questions.

By the Court:

Q. What is the distance between two side tracks, the distance between the rails?

By the Witness:

A. I could not tell you exactly.

By Jno. C. Moore:

Q. Are those distances uniform?

A. Oh, yes.

245 Q. I don't mean the distances in the track; when there is two tracks side by side are the distances between them always uniform?

A. Certainly.

Q. Aren't some tracks sometimes laid farther away from other tracks?

A. Yes, occasionally, but in switch yards the distance of what is called the clear between the tracks is uniform.

Q. Do you know that distance?

A. Not exactly.

Q. It is a good deal wider than the distance between the rails of a track?

A. Yes, sir.

Q. It is so two trains can pass and still leave room enough for a person to stand between them?

A. Yes, sir.

By Jno. C. Moore: That is all.

Witness excused.

246 (Here at the request of Jno. C. Moore an affidavit regarding documents demanded, is by the Reporter marked as Exhibit "E.")

By Jno. C. Moore: I now offer in evidence Exhibit E, being the affidavit regarding the documents demanded from the defendant.

By W. H. Moore: To which the defendant objects as incompetent, irrelevant and immaterial.

By the Court (examining Exhibit E): The affidavit states a lot there on information and belief that could not be considered at all.

By Jno. C. Moore: That is not an objection as I understand it.

By the Court: If they make an objection as incompetent, irrelevant and immaterial, it is immaterial what a man believes about a thing.

By Jno. C. Moore: That is an offer that is frequently held sufficient.

By the Court: I don't know of it being held sufficient to go to a jury; I don't know exactly the situation of the record.

By W. H. Moore: This is the situation: The Statute provides where notice is served on us to produce a paper, if we fail to produce it an affidavit may be made as to the contents of that paper and introduced in evidence. This affidavit does not attempt to state the matter in those coal tickets; we are not to be penalized for the wind blowing them away.

247 By the Court: The objection to the affidavit, Exhibit E will be sustained.

By Jno. C. Moore: Before the Court makes the order. Certain parts of this affidavit are made on information and belief and they are distinctly separated from the parts that are made positively, so that I do not think the objection ought to be sustained as to those parts that are made on positive allegations. I appreciate the position of the Court, but this made on information and belief, the witness has been so careful about it to distinguish between what he knows and what he believes, and they are separated here.

(Court examines affidavit marked Exhibit E.)

By the Court: Objection sustained and an exception allowed the plaintiff.

And which said Exhibit E, so offered by the plaintiff and refused by the court, is in the words and figures following, viz:

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## EXHIBIT "E."

In the District Court of Garfield County, Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
a Corporation, Defendant.

Offered by plaintiff.

Refused by the court and not read to the jury.

*Affidavit Regarding Documents Demanded.*

Plaintiff declares, that on the 11 day of September, 1913, he, in writing, demanded of defendant inspection and right to take copy of all the original coal tickets actually turned in to said Company by William M. Turner, deceased, on the 28 day of July, 1912, obtained from the coal ticket boxes at Enid coal chutes of that day which had been placed in said boxes by engineers for the 24 hours preceding five o'clock, p. m. of Sunday evening the 28 day of July, 1912; also his report of cars of coal unloaded that day to the chute pockets at Enid, Oklahoma, in his own handwriting if it exists or was made, and if made orally, and in writing by and of the servants of said Company, the original writing constituting such report; also any demand or order he that day made, and the hour thereof of any car or cars to be set on the chutes at Enid for unloading, that plaintiff might take inspection and copies thereof; a copy of which demand is hereto attached and marked Exhibit A. That afterward, on the 14 day of November, 1913, plaintiff renewed said demand in writing and served same on defendant, the same being now among the files in this cause. That afterward, on the 19 day of November,

1913, on notice given, plaintiff moved the Court to make an  
249 order on defendant, which the Court did, to furnish such documents as demanded by the (plaintiff) the 28 day of November, 1913, at ten of the clock in the forenoon. Plaintiff says that the defendant has failed to comply with said order and still fails so to do.

Plaintiff, therefore, declares, that there were coal tickets deposited in said coal ticket boxes by a number of trains between five o'clock of Saturday evening the 27 day of July, 1912, and five o'clock, evening, of the next day, that is by engineers of engines pulling trains; that no report was made by said Turner that day of Cars of coal unloaded into chute pockets, nor order made by him of coal to be set on the chutes, nor any original report of coal taken, made up from such coal tickets, nor any coal tickets by him returned into the freight house of the company for the twenty-four hours preceding the hour of five o'clock, evening, of July 28, 1912; and he states on information and belief that such coal tickets were in the possession

of said Turner when he was run over and killed, and that the same were scattered in the wind and lost; that he made no report of coal unloaded because he was killed, as stated, before he had reached the freight house; that he made no order or demand for coal to be set to the chutes because he was run over and killed while on his way to the freight house with the coal tickets in his possession to turn them in, to order coal set to the chutes and to report the cars he had unloaded; and plaintiff asks the Court to consider and rule that the said documents are such as plaintiff in this affidavit declares them to be.

A. P. BOND.

A. P. Bond, being duly sworn, on his oath, declares that he has read the foregoing affidavit; that is, he has had the same carefully  
250 fully read to him, and he knows the contents thereof, and that all the matters and things therein contained are true, except those stated on information and belief, and as to those he believes them to be true.

A. P. BOND.

Subscribed and sworn to before me this 29 day of November, 1913.

[SEAL.]

GEO. M. SCIFRES,

*Clerk Dist. Court.*

251 In the District Court of the United States in and for the Western District of the State of Oklahoma.

A. P. BOND, Administrator of the Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
a Corporation, Defendant.

EXHIBIT A ATTACHED TO AFFIDAVIT OF A. P. BOND.

(Offered by plaintiff. Refused by the Court and not read to jury.)

*Demand for Inspection of Papers and to Take Copies.*

To the Chicago, Rock Island and Pacific Railway Company, Defendant, and to C. O. Blake, J. G. Gamble, and Roberts and Curran, its attorneys of record in the above entitled cause:

I hereby demand of you and each of you that within the time limited by law, you furnish me with the original coal tickets actually turned in to you by the deceased, William L. Turner on the 28 day of July, 1912, for my inspection, and that I may take copies thereof; also his report of cars unloaded of coal by him that day to the chute pockets at Enid, Oklahoma, in his own handwriting if it exists, and if his report was made orally and taken down in writing by any of your servants, the original writing constituting said report, if any;

also any demand or order he that day made, and the hour thereof, of any coal car or cars to be set on the chute at Enid, Oklahoma, for unloading, that I may inspect the same and take copies thereof; and that in default thereof in any particular or as to all of said demands, I shall ask the Court to hold with me that no such coal tickets were that day turned in by said Turner, no report of cars of coal so unloaded by him, nor order for cars to be set in to said chutes for unloading therein.

I further demand of you the original of all coal tickets taken from the box at the chutes of coal taken by engines from the  
252 hour of five o'clock of Saturday the 27 day of July, 1912, to the hour of the death of said Turner at about five o'clock of Sunday, the 28 day of July, 1912, which were by you or by any of your servants, agents or employes taken from said box after the death of said Turner, and the hour, day, month and year when the same were taken therefrom and by whom, that I may inspect the same and take copies thereof, and on failure to comply with this demand I shall ask the Court to hold with me that no such tickets exist.

JOHN C. MOORE,  
*Attorney for Plaintiff.*

Received a copy of the above and foregoing demand for original instruments, for the purpose of inspection and to take copies in the foregoing cause, this 11 day of September, 1913.

C. O. BLAKE,  
J. G. GAMBLE,  
ROBERTS & CURRAN,  
*Attorneys for Defendant Railway Company.*

(Attached to affidavit of A. P. Bond, and refused by the Court.)

253 By John C. Moore: "The plaintiff rests."

By W. H. Moore: I want to cross-examine the witness, George W. Bond before I re-interpose my demurrer, and I cannot do it without those papers in the possession of Colonel Moore.

By Jno. C. Moore: I will go and get them.

(Here Jno. C. Moore leaves court room for a few minutes and returns with certain papers demanded.)

GEORGE W. BOND, a witness, of lawful age, being first duly sworn and examined, and being recalled for further cross-examination, testified as follows, to-wit:

Cross-examination.

By W. H. Moore:

Q. Mr. Bond, Mr. Turner was killed on Sunday, the 28th of July, 1912, do you recollect what you were doing the day before, on Saturday?

By the Witness:

A. Yes, sir.

Q. What were you doing?

A. I was out threshing wheat with a threshing machine.

Q. How long had you been out with a threshing machine?

A. Pretty near four weeks.

Q. When did you come back?

A. Saturday evening.

Q. What were you doing Sunday?

A. I was up around town here doing nothing.

254 Q. Were you down about the coal chutes at all on Sunday?

A. No, sir, only I was down there that evening.

Q. After Mr. Turner was killed?

A. Yes, sir.

Q. What was your purpose in going down there then?

A. I heard them take Charlie Nelson's statement about what Turner told him about the tickets, and I thinks I would look in the box and I looked and there was as much as two tickets in that box.

Q. You didn't look in the others—what time of day was that?

A. It was after they took Mr. Turner away.

Q. It was still day-light?

A. Yes, sir.

Q. What did you do on Monday?

A. I went to shoveling coal; Nelson took the chutes.

Q. Do you remember how much coal you handled on Monday?

A. No, sir.

Q. How many cars did you shovel that day?

A. I didn't shovel e'er a one.

Q. How many tons?

A. I generally averaged about twenty-five tons a day.

Q. What did you average that day?

A. I don't remember.

Q. How were you shoveling this coal, from the car into the chutes?

A. Yes, sir.

Q. How many cars was there at the chutes for unloading on that Monday?

A. I think there was two.

Q. How much was in the chutes?

A. I could not tell you exactly; I never counted it up.

255 Q. Then for something like four weeks before Mr. Turner was killed up until after his death you knew nothing about what was going on in the yards here in Enid?

A. No, sir.

Q. About that time were they using a good many oil burners?

A. I think they were using quite a few.

Q. During the time they were using oil burners you handled less coal?

A. Yes, sir.

Q. For a time when they were using so many oil burners the amount of coal at the chutes dropped to nearly nothing?

A. Some days it would and some days it was a lot.

Q. Some days it would run down to as low as four tons?

A. I never knew of that.

Q. Did you ever know of it dropping down to that?

A. I never knew a day but what they pulled more coal than that.

Q. What was the number of the switcher, do you recollect?

A. I don't believe I can tell you.

Q. So all of your testimony in regard to the handling of coal there at the chutes was at a time either four weeks before Mr. Turner's death or after his death?

A. Yes, sir, that is all. I asked them a month's lay-off to go with the threshing machine.

Redirect examination.

By Jno. C. Moore:

Q. Who was Nelson talking to?

By the Witness:

A. I suppose to the railroad men; I don't know who it was.

Q. Were they taking his statement?

A. Yes, sir, they asked him certain questions——

Q. They were taking it for the Railroad Company?

256 By W. H. Moore: We object as incompetent, irrelevant and immaterial.

By the Court: My recollection is that was a voluntary answer on the part of the witness.

By Jno. C. Moore: He stated it was because Mr. Nelson had said Turner had gone to the coal chutes for the tickets, and I was aiming to show that he made the statement to the railroad officials.

By W. H. Moore: That came out purely voluntarily.

By the Court: Sustained.

By John C. Moore:

Q. Who was Nelson talking to?

By the Witness:

A. I don't know his name.

Q. Would you know him if you would see him now?

A. I don't know that I would.

Q. I will ask you if it was the Conductor of the train that engine 2113 was pulling——

By W. H. Moore: We object as incompetent, irrelevant and immaterial.

By the Court: You would have to show first that he knew who the Conductor was.

By the Court:

Q. Did you know who this was doing that?

By the Witness:

A. No, sir, I didn't know him.

257 By Jno. C. Moore:

Q. Do you know who he was representing in doing that?

By the Witness:

A. The Rock Island I suppose.

By the Court: Don't state that; that is stricken out.

By the Witness:

A. I didn't know exactly.

By Jno. C. Moore:

Q. Couldn't you tell from the conversation who he was representing?

By W. H. Moore: He says he don't know, and we object.

By the Court: Sustained.

By John C. Moore: That is all.

By W. H. Moore: That is all.

Witness excused.

258 By John C. Moore: The plaintiff rests.

*Demurrer to Plaintiff's Evidence Renewed.*

By W. H. Moore: The defendant renews its demurrer. Come now the defendant at the close of the plaintiff's evidence, and demurs to the evidence offered, for the reason that said evidence is not sufficient to entitle the plaintiff to a verdict against the defendant.

By the Court: Gentlemen of the Jury: You will be excused from the jury box and from the court room for about ten minutes. In the mean time remember the admonition of the Court not to talk about the case on trial either among yourselves or with any other person, and do not remain in the presence or hearing of any person discussing the case.

Thereupon, the jury sworn to try the issues in this cause retire from the court room.

By the Court: The demurrer in this case is based upon a supposition that the plaintiff has not made out a case. As I understand it, there are three things absolutely necessary for plaintiff to prove in order to get to the jury;

First,—The accident;

Second,—That the defendant was a common carrier and engaged in inter-state commerce; and upon those two points there cannot be any particular doubt. I don't think there can be any controversy but what the defendant was engaged in inter-state commerce.

259 By W. H. Moore: None whatever.

By the Court: And Third,—the vital thing in the case is that the deceased at the time the injury occurred was in the employ of the defendant in the discharge of his duty, and at that time he was participating in what is called inter-state commerce, and it seems that



FILED  
OCT 10 1915

WALTER D. BAILEY

CLERK

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

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CASE No. 86, OCTOBER TERM, A. D. 1915

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THE CHICAGO ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY, Plaintiff in Error.

A. B. BOND, ADMINISTRATOR OF THE ESTATE  
OF WILLIAM LITNER, DECEASED, De-  
fendant in Error.

---

ERROR TO THE SUPREME COURT  
OF THE  
STATE OF OKLAHOMA

---

MOTIONS TO DISMISS AND TO AFFIRM

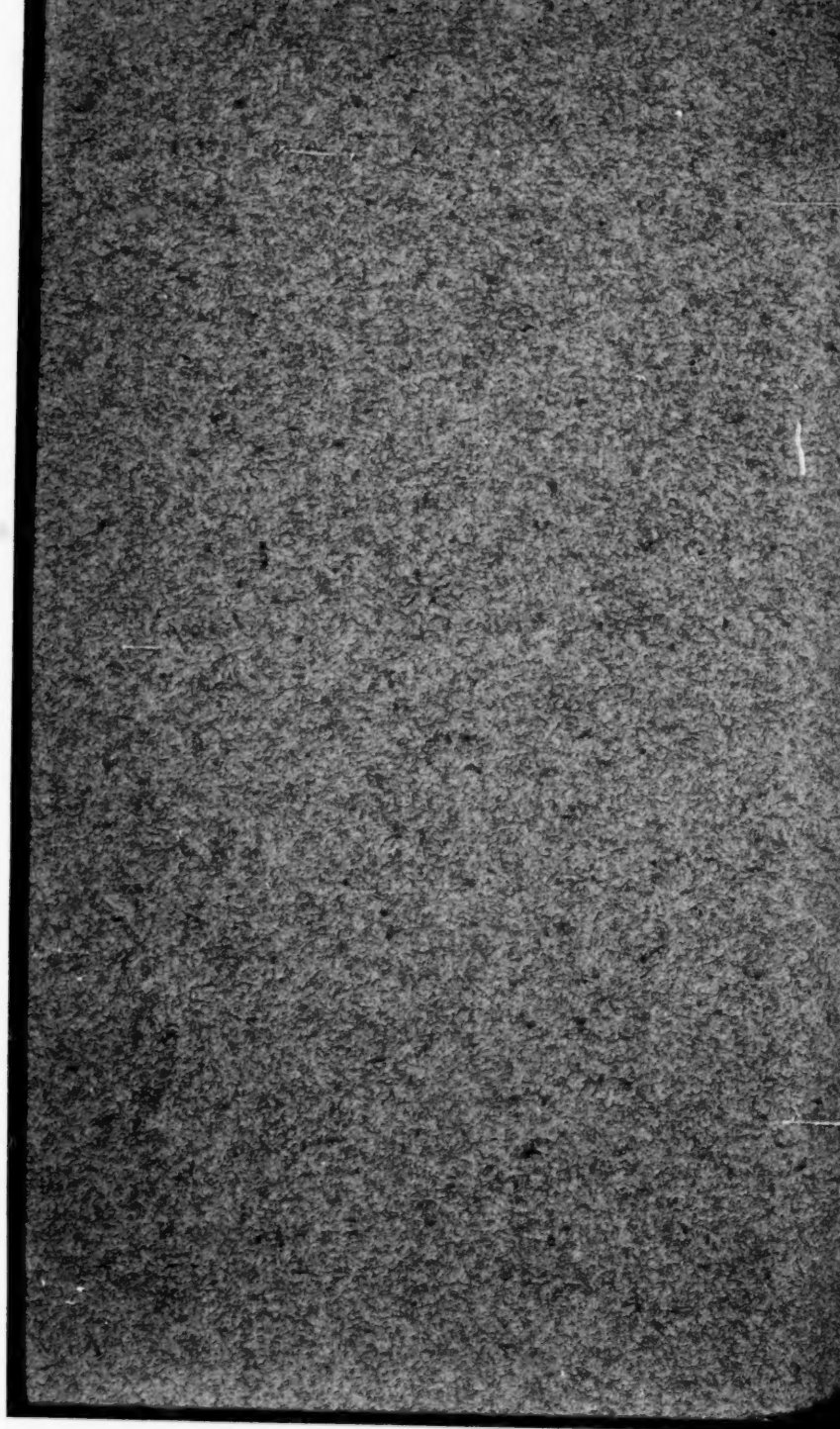
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Submitted to Court and Court of Appeals on Motion  
for Judgment in Error.

WALTER D. BAILEY

Attorney and Counsel for Plaintiff in Error.

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IN THE SUPREME COURT OF THE  
UNITED STATES.

Case No. 486, October Term, 1915.

The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error.	{	Error to the Supreme Court of the State of Oklahoma.
vs.		
A. P. Bond, Administrator of the Estate of William L. Turner, Deceased.		
Defendant in Error.		

MOTIONS TO DISMISS AND TO AFFIRM.

Now comes A. P. Bond, Administrator of the Estate of William L. Turner, Deceased, the Defendant in Error, by John C. Moore, his counsel, and moves the court to dismiss and quash the paper purporting to be a writ of error herein for want of jurisdiction, and because the paper purporting to be a writ of error is informal, irregular and insufficient on the grounds stated in the annexed argument and upon other grounds; and the said defendant in error also moves the court to affirm the judgment of the Supreme Court of the State of Oklahoma upon the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only, and that the questions on which the decision of the cause depend and those on which it is claimed that the jurisdiction depends are so frivolous as to need no further argument.

JOHN C. MOORE.

Attorney and counsel for Defendant in Error.

CERTIFICATE.

I hereby certify that I am familiar with the above and foregoing motions to Dismiss and to Affirm, and with the whole record of the cause, and all action taken therein, and that in my opinion the said motions are well taken.

Dated this 16 day of October, 1915.

JOHN C. MOORE.

Attorney and counsel for Defendant in Error.

NOTICE OF SUBMISSION OF MOTIONS.

TO DISMISS AND TO AFFIRM.

Gentlemen:—

Please take notice that on the annexed verified statement of facts herein, I shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, November 15, 1915, at the Capitol, in the city of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies; and that I shall submit with said motions, and in support of the same, the arguments annexed to said statement of facts and printed portions of the record.

Enid, Oklahoma, October 16, 1915, A. D.

Respectfully Submitted,

JOHN C. MOORE.

Attorney and counsel for Defendant in Error.



To C. O. Blake,  
R. J. Roberts,  
W. H. Moore,  
J. G. Gamble,  
K. W. Shartel,  
Attorneys for Plaintiff in Error,  
Rock Island Lines,  
Law Department,  
El Reno, Oklahoma.

PROOF OF SERVICE.

STATE of OKLAHOMA, }  
COUNTY OF GARFIELD, } ss

John C. Moore, of lawful age, being first duly sworn, on his oath states:

That he is counsel and attorney for A. P. Bond, Administrator, Defendant in Error in the foregoing cause. That on Saturday, the 16th day of October, 1915, affiant deposited in the United States mail, at the post office in Enid, Oklahoma, a copy of the motions to Dismiss and Affirm in the above entitled cause and a notice of the submission of said motions for Monday, the 15th day of November, 1915, to this court, and attached thereto a printed copy of the Printed Brief and Argument, one of each to C. O. Blake, R. J. Roberts, W. H. Moore, J. G. Gamble and K. W. Shartel, of counsel and attorneys in this action for Plaintiff in Error, securely bound and sealed in a package, addressed—Rock Island Lines, Law Department, El Reno, Oklahoma, that being the address of all said counsel and attorneys, and fully prepaid the postage thereon. That in the due course of the mails such package should

—IV—

be delivered the day of mailing, or at the furthest the next day thereafter.

JOHN C. MOORE.

Subscribed and sworn to before me this 16th day of October, 1915.

(SEAL)

GEO. M. SCIFRES.

Clerk District Court, Garfield County, Oklahoma.

BRIEF STATEMENT OF FACTS.

REMARK.

At the close of the "Brief of Argument," Defendant in Error has added an "Appendix," being printed portions of the record, duly verified, and which is separately and independently paged with Arabic numerals from 1 to 247. In the brief, all references are to these pages. This appendix contains all of the record, pleadings and evidence, instructions and court orders, which counsel believes necessary for this court to fully understand the case in support of the motions to Dismiss and to Affirm.

1--THE PLEADINGS.

The Defendant in Error, June 4, 1913, filed in the District Court of Garfield County, Oklahoma, his action as administrator of the estate of William L. Turner, deceased, against the Chicago, Rock Island and Pacific Railway Company, the Plaintiff in Error. The declaration was under the act commonly called the Employer's Liability Act of April 22, 1908, and its amendments of April 5, 1910, being respectively 35 Statutes at Large, 65, and 36 Statutes at Large, 291, P. 1 to 18. Its exhibits attached

are A, P. 18 and B, P. 25. These were introduced in evidence, P. 93-94.

The Plaintiff in Error, June 24, 1913, P. 30, filed its petition for removal to the United States District Court for the Western District of Oklahoma. The statutory ground of diversity of citizenship was sufficiently alleged, but there was another allegation, not statutory, inserted in these words:

“Seventh:—Your petitioner further avers that the said William L. Turner, deceased, for whose death this action was brought was not at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the states, or engaged in interstate commerce.” P. 31.

The Federal Court had a trial on these issues, P. 62, 168, 175, and afterward remanded the cause to said State court. P. 244.

After this remand, the Defendant in Error, on October 24, 1913, filed his amended complaint, P. 33 to 45. Thereafter, November 14, 1913, the Plaintiff in Error filed its answer, denying each and every allegation of the Complaint, but that it was a common carrier by railroad and engaging in commerce between the states, and this it admitted, and charged the deceased with the whole negligence, P. 45 to 47. The next day Defendant in Error filed his reply, which was general denial of the answer, P. 48.

—VI—

The issues thus were:

1—Was the deceased an employe of Plaintiff in Error when killed by it?

2.—Was he performing for it an act of interstate commerce?

3—Was the Plaintiff in Error negligent in killing him?

2---THE TESTIMONY.

Turner's work is divided into three parts:

First, that under his contract exhibit A, of eleven different items, as follows:

1—To unload coal into the chute pockets.

2—To pick up the 'chute droppings" and put them either on engines or cars, as the company desired.

3—To break all coal to four inch cubes.

4—To unload wood on storage piles on the right of way.

5—To unload coal for stationary engines.

6—To load cinders at places designated by the company.

7—To unload sand from cars designated by the company.

8—To receive, collect and turn in all coal tickets left by engineers for coal delivered to engines.

9—To report all coal unloaded.

10—To be prompt at his work.

11—To surrender his contract and submit to discharge without the right to damages whenever the designated officer of the company or other agent appointed by him should so adjudge. For this work he was paid by the ton for coal, by the cubic yard for sand and cinders, and by the cord for wood. P. 18 to 24.

Second,

Under his contract, exhibit B, he was required as follows:

12—To cooper all cars which the Round House Foreman required of him to make them hold grain for transit.

13—To submit his work so done for inspection of that officer for approval, and if not approved, to continue in such repairs until he should approve. He was paid by the car for such work. P. 25 to 29.

Third,

Outside his contracts he was put to

14—Transferring freight from bad order cars to good order cars. P. 82, 93, 141.

15—To loading coal from coal cars on the tracks to engines also on the tracks. P. 176.

16—To unloading kindlings from cars. P. 93.

In doing his work he was "all the time" under the control and direction of one Bowman, the Station Agent and Yard Master.

#### BOWMAN TESTIFIES:

"Q. From whom did Turner get instructions about handling work performed by him? —178.

A. Under his contract from me. 178.

Q. You directed him what to do? 178.

A. Yes, either me or my chief clerk. 178.

Q. So that he was under your supervision and control all the time? 178.

A. In so far as his contracts were concerned, yes, sir. 178.

Q. He performed his duties in accordance with what you directed him to do? 178.

A. Yes, sir. 178.

—VIII—

Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island coal? 179.

A. Yes, sir." 179.

The Exhibit A, contained these two clauses:

"And the contractor further agrees that the Railway Company shall not be liable in case of his death or injury while employed in the work herein set forth." P. 21.

"Ninth—It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing of such work other than as to the results to be accomplished." P. 23.

3---WHAT ACT TURNER WAS DOING.

When killed Mr. Turner was on his way to the freight house to turn in his coal tickets, and to report the coal unloaded. P. 119. 241.

By his contract, exhibit A, he was required to do this every day. P. 23.

He did this every day. P. 85-96.

Each ticket he turned in daily showed the name of the engineer who made it, the number of the engine, the amount of coal taken and the date. P. 98-97.

Afterward they were sent to Chicago. P. 238.

These daily returns of tickets covered twenty-four hours. P. 96.

There were 22 chute pockets. P. 131.

Turner had gone toward the chutes after being informed that the coal there was all unloaded, soon after four o'clock, p. m. P. 125-126 and 132.

The tickets were deposited in two boxes at the chutes by engineers who took coal. P. 23, 83.

He almost generally turned in his coal tickets to Frank H. Wallace, the chief clerk at the Freight House at from four to six o'clock p. m. each day. P. 96.

He had not turned them in on the day he was killed. P. 101.

After Turner was killed, a witness saw two tickets in one box, P. 148, but after Turner had gone toward the chutes, and just before he was killed, two trains had come in, 2113, from the north, from Kansas, P. 180, and had gone south to the chutes and was backing up and killed Turner, P. 180, and 24, which had pulled the passenger in P. 125-126. The evidence is silent as to whether they left coal tickets.

The Chief Clerk, Wallace, to whom Turner always delivered the coal tickets, went to the chutes to get the coal tickets after Turner was killed, and he got "some" tickets. P. 101. He does not indicate how many.

Turner's clothes were wet with sweat and dirty, he had been at work, P. 53, shoveling coal. P. 123.

It was a windy, blustery day. P. 57. A high wind was blowing from the south. P. 66.

The train which ran over him was running from twenty to twenty-five miles an hour. P. 74, 185, 225, —, "Coming in very fast," P. 74.

The tickets were not found on his person, P. 55, and were not produced in court.

The tickets which the Chief Clerk, Wallace, got at the chutes were not produced in court.

## THE KILLING.

He was killed in this manner: Train 24 on the main track was rushing to the station depot. East of this, with two tracks between, 2113 was backing at 20 to 25 miles an hour. Both going north, 24 a little advanced. Turner had been walking north in a place east of that track on which 2113 was backing, unconscious of it, and stepped upon that track to cross it, and did cross until he set his left foot down outside the west rail and was in the act to step with his right foot over that rail and in the clear, when a brakeman on the advancing car suddenly yelled, and Turner, who had been proceeding northwest turned to the right facing the east and was immediately struck down across the track. P. 72 to 79.

The fireman in the cab with the engineer, from the east side of the cab saw Turner north of him walking north. Suddenly Turner disappeared, P. 224, but the fireman gave the engineer no slow up signal, nor stop signal, nor did he tell him what he had seen. P. 227.

Turner lay with his face down, P. 50-59, his head crushed on the east rail, P. 52-59, his left foot cut off and lying outside the west rail, P. 52-59, and his right foot uninjured, but just within the west rail. P. 52-59. A bruise was on his right side which was made just a few pulsations before the blood ceased to beat. P. 52 to 55.

Turner had a short time before gone toward the chutes when notified that the coal there was all unloaded, P. 125, and both these trains had come afterward, 24 from the south and 2113 from Kansas, P. 180, from the north,



but the latter had run to the chutes on the south with the engine, and was backing north, P. 74-228.

### VERIFICATION.

STATE of OKLAHOMA,     }  
COUNTY OF GARFIELD,   } ss

John C. Moore, of lawful age, being first duly sworn, on his oath states that he is attorney and counsel for the Defendant in Error, Bond, in the above entitled cause. That he prepared the "Brief Statement of Facts," above, and that each allegation contained therein is supported by the evidence referred to by paging, and which evidence is contained in the record of this cause in the hands of the Clerk of this Court, and that no allegation is made therein of any fact without being supported by the record. That any references in other parts of the brief, itself, are so supported, and none are made of any fact not so contained in the record. The paging references are to the "Appendix."

JOHN C. MOORE,  
Subscribed and sworn to before me this 16 day  
of October, 1915.

(SEAL)                      GEO. M. SCIFRES.  
Clerk District Court, Garfield County, Oklahoma.

## JURISDICTION.

The contention of Plaintiff in Error does not seem to be made that there is no evidence showing liability under the Employers Liability Act, but rather that the facts stated in the complaint, and adduced in the evidence, fail to bring the case under the said act. In other words that the case does not arise under that act. It is insisted that the injured man was an independent contractor and not a servant, and that he was not subject to the terms of the act. See Fifth assignment of error, in this court, hereinafter quoted. Plaintiff in Error at the close of the evidence in writing requested the court to give peremptory instruction to the jury to find for the defendant carrier. This the trial court refused. P. 242.

This court, June 10, 1913, rendered its decision in the case of the St. Louis, Iron Mountain and Southern Railway Company v. McWhirter, 229 U. S. 265, approving a method adopted by that company to preserve its rights for review under the Act of April 22, 1908, and its amendments, April 5, 1910, commonly called the Employer's Liability Act.

In the case at bar, the Plaintiff in Error used the form there adopted by the Iron Mountain. P. 242.

Two material and essential differences exist:

First—The Iron Mountain admitted the Federal Act as the law of the case, and tried it on that law. In this case the Plaintiff in Error denies that the Federal law is the law of the case, P. 30, 31, 46, 243, 246, 247, and tried it on such denial.

—XIII—

Second:—The contention of the Iron Mountain was that there was no evidence tending to show liability under the act. Examination by this court of the testimony on negligence in that case showed that this contention was well founded. In this case a similar examination will show that no such contention can be truthfully made, on any of the four jurisdictional points.

In this cause, notwithstanding the inhibition of the sixth section of the Employer's Liability Act and the twenty eighth section of the Judicial Code, the Plaintiff in Error, without alleging any facts, except diversity of citizenship, filed its petition for removal. P. 30. That petition contained these words besides, which are not statutory:

"Seventh—Your petitioner further avers that the said William L. Turner, deceased, for whose death this suit is brought was not, at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the states, or engaged in interstate commerce." P. 31.

This petition is a declaration, not that the facts alleged in the complaint are not true, but that their legal significance is not truly interpreted by the complaint.

It is a very unusual allegation, and it induced the Federal District court to do more than pass upon the complaint. That court had a trial, and the testimony was adduced. P. 62, 168, 175, and thereupon, it remanded the cause. P. 244.

After remand, and after trial in the original court of the state, while the jury were

being instructed, the Plaintiff in Error presented an instruction in these words:

"22. The court instructs the jury that under the evidence in this case, the deceased, William L. Turner, at the time of his death, was what is known as an independent contractor, and was not at said time an employe of the defendant engaged in interstate commerce within the meaning of the law, and its verdict must be for the defendant." This the trial judge refused. P. 243.

This refusal was by the Supreme Court of Oklahoma, sustained, see opinion, and in appealing to this court, the Plaintiff in Error assigned this as the Fifth assignment in these words:

"5. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its refusal to hold that the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an independent contractor, and therefore not subject to the terms of the act of Congress, entitled; "An Act Relating to Liability of Common Carriers by Railroad to their Employes in Certain Cases," approved April 22, 1908, (35 Statutes at Large, 65), as amended April 5, 1910, (36 Statutes at Large, 291.)." 246 to 247.

The Plaintiff in Error carried with this the additional denial that the deceased was engaged in performing an act of interstate commerce, when killed, but this seems to be founded on the other contention, to-wit: That he was an independent contractor and not an employe.

The federal court was the first to deny these contentions, then followed by the state trial court, and then by the state Supreme Court, and now reversal is sought by the Plaintiff in Error in this court.

The Defendant in Error freely admits, that a defendant has a perfect right to have this Federal act properly administered whether he denies its application to the case or not, but if, in the trial, the defendant has never invoked a right under it, but has at all times denied its application to the case, then the right to review has not been preserved.

The proper administration of the act, and the right of review, are different. The latter is purely statutory, and a litigant must show that he invoked a right and was refused. Mere form, while denying the applicability of the Federal law, is not contemplated by the McWhirter case. Substance is intended, in other words, a well founded contention, admission of the law being the law of the case, and preserving a right under it.

This court examined the evidence in the McWhirter case, and found the contention that the evidence disclosed no liability under the Federal act, was well founded.

Following that method, Defendant in Error prints all the evidence bearing on the four jurisdictional points, that the court may see, from the pleadings and the evidence, both in the appendix hereto, that the Employer's Liability Act was properly administered and that Plaintiff in Error did not preserve the right of review.

He divides them as follows:

1. That Plaintiff in Error was a common carrier by railroad engaging in commerce between the States.
- 2 That deceased was its employe, and not an independent contractor.
- 3 That he was engaged, when killed, in performing for it an interstate commerce duty.
- 4 That the Plaintiff in Error was guilty of negligence in killing him.

Defendant in Error believes that no item of any consequence is omitted in that portion of the record printed in the Appendix, which gives first, the pleadings, and second, the evidence on the points involved.

—XVII—

BRIEF OF ARGUMENT.

FIRST.

Plaintiff in Error has admitted that at the time of this injury it was a common carrier by railroad engaging in commerce between the States. P. 46, That point is therefore disposed of.

SECOND.

WHETHER INDEPENDENT CONTRACTOR OR  
EMPLOYEE.

Defendant in Error can not understand that there is *bona fides* in the contention of Plaintiff in Error, that the deceased at the time of his death was an independent contractor. It is true that the ninth clause of the contract, Exhibit A, reads as follows:

“Ninth—It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in doing of such work other than as to the results to be accomplished.” P. 23.

We have, however, these definitions:

“An independent contractor is one who is not controlled by the owner in his work, and if the master reserves the control over him, or directs his work or can direct his work, then he is not an independent contractor. It is the control which the owner exercises or has the right to exercise, that determines the relation.”

Atlantic Transport Co., v. Conys, 82 Fed.  
177.

“The relation of master and servant exists

whenever the employer retains the right to direct the manner in which the business shall be done as well as the results to be accomplished, or in other words, not only that it shall be done, but how it shall be done."

Singer Manufacturing Co., V. Rahn, 132 U. S. 513.

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own method, and without being subject to the control of his employer except as to the result of the work."

Words and Phases, Title—Independent Contractor.

Moll, on Independent Contractors, on page 76 indicates that in the humble walks of common labor, where the work is of a simple character, that the only admissible inference is that the relation of master and servant exists. On the next page he informs us that where the employment is general, that the relation of master and servant is created.

The reserved right of discharge, P. 22 does not comport with the employment as an independent contractor. Nor does his being carried on the laborers roll, P. 174 at the same time that he holds a subsisting contract.

Tested by these simple rules, we see Bowman declaring that he controlled Turner in his work so far as his contracts were concerned, and directed him what to do. P. 178 and 179. This comports with the nature of the fifteen or sixteen different things he did, and most of



which are in the contracts. Bowman was the head man at Enid, and all information came to him. So that he alone knew what must be done and when it must be done. P. 177.

If doing one necessary thing was more pressing than any other thing, he knew it and directed accordingly. Shoveling coal into the chutes must wait if Bowman said that sand must first be unloaded, or cinders loaded, or cars coopered, or freight transferred, or any other work Turner was accustomed to do. Not Turner, but Bowman said what must be done. Turner was the mere tool, the laborer. He had no option, only when he had nothing set for him. Whatever was set for him by Bowman he must do, or Turner's head would come off for not carrying out his contract. P. 22.

He could not go to work on the chutes, though he might want to do so, if Bowman required that he should work at something else more pressing. The business must be attended to right, in order to economize it and put forward the transportation.

Turner doing as he pleased, not obeying, and not knowing the urgency of some kinds of work while other kinds were not pressing, does not comport with good management and economy.

Bowman had all the information and knew what to do, P. 177-178-179, but no other man at Enid knew these things. Bowman was the trusted and competent head, and unless he did

direct Turner, Turner would be frittering away his time. The many duties prescribed in the contracts and the expressions used show clearly that he must pass from one duty to another. He would not know when to pass unless he was told. He might be called away from the chutes to cooper cars, and while in that work he was under the power of the Round House Foreman. P. 25. He might be called to transfer freight from bad to good order cars, as was done, because the freight must be pushed on to its destination. P. 82, 93, 141.

It seems unnecessary to multiply, but all kinds of instances can be enumerated where, unless Turner was under this control his work would be mere foolishness, but under direction, it was at all times effective.

Now, while these contracts existed, Bowman says that at times Turner was carried on the pay rolls as a laborer. P. 174. It is wholly inconceivable that he could be an independent contractor, and yet be carried as a common laborer. The ideas are directly antagonistic. They could not have this relation of independent contractor for pay in a certain way, and at the same time be on the rolls for pay as a common laborer.

This Exhibit A, was in perpetuity, in this sense: Either party, without cause could terminate it by giving a notice. P. 22, but the company retained the right to discharge Turner

for failure to comply with his contract, and were the sole judge of this. P. 22.

There was not a specific piece of work, which he contracted to do, but a multitude of duties, and they continuing for an indefinite period. P. 22.

The object and intent of the words quoted above, where Turner covenants and agrees that the company shall not be liable in case of his death or injury while engaged in this work, was to relieve the carrier from liability for damages, and as such, are denounced by the first clause of the fifth section of the Employer's Liability Act, and that far the contract is by statute declared void.

The Ninth clause of this contract, quoted above in juxtaposition with the other, can not mean that Bowman should not control Turner, nor direct him in the work under his contract, for if it did it woefully failed in its operation, for he did control Turner, and the contract meant that he should control him. Defendant in Error conceives but one purpose for that ninth clause, and that was the same as the other; to relieve the carrier from liability, by Turner bargaining away his right to sue under the act, and to deprive his personal representative of this right, also. As such, it is under the ban of the Fifth section of the act.

At this point it will be seen that Plaintiff in Error has nothing to hang its theory on, that Turner was an independent contractor, but

this ninth clause in the exhibit. No evidence adduced points to this conclusion, but all points away. It all points to his being the servant, the employe.

It is, it must be, perfectly plain, that this carefully worded contract was devised, and its form approved by the eminent counsel, P. 24, with the object and intent of exempting the Plaintiff in Error from liability under this act. If it be not so, then Turner's usefulness in work was at an end. The clause is wholly at variance with the purpose for which the contract was made. Its only effect is to exempt the company. Hence it was drawn for that purpose, for it was drawn and approved by acute, devoted and learned men.

The Federal court tried this issue when removal was had, and it is fair to presume that the evidence in that court was the same as that in the state court, afterward.

The conclusion of the Federal Judge that Turner was an employe and not an independent contractor, which he had to find in order to remand, strengthens the presumption that the state courts did not err in reaching the same conclusion.

As no evidence but the said ninth clause squints at independent contractor, it seems apparent, that this position, occupied in the start, and persisted in to this time and still insisted upon, is not done in good faith, but must have the ulterior object of delay.

### —XXIII—

It appears to be setting up against the law of the United States a contention that the law of the United States does not apply, but that the undisputed facts have a different legal significance. If this be so, then Plaintiff in Error has not preserved the right of review on this point.

### THIRD.

#### WHAT TURNER WAS DOING.

What he was doing when killed, was to take the coal tickets to the freight house and turn them in and order coal set on the chutes. That is, report all the coal unloaded. P. 119-240. Plaintiff in Error does not seem to dispute that if this is true that such acts were acts of interstate commerce. These tickets being left in a box or two boxes at the chutes by engineers who took coal for their engines, represented the coal taken in a period of twenty-four hours. P. 96. The coal was taken indiscriminately for engines local and going out of the state. They represented both kinds of commerce. P. 93. The tickets contained the name of the engineer, the number of the engine, and the amount taken, and bore the date of taking the coal. P. 98. Under the contract, Exhibit A, one of Turner's duties was to collect these tickets from the boxes and deliver them to the proper representative of the road. P. 23. After that they were forwarded to Chicago. P. 238. The objects in having the tickets were to know what was done with the coal, and to keep

—XXIV—

the coal account. P. 99. Turner collected these tickets daily from 4 to 6 o'clock, and turned them in at the freight house, to the chief clerk. P. 96. The clerk sent them to Chicago. P. 238.

Soon after 4 p. m. on the day he was killed he was informed by a helper that the coal was all unloaded from the chutes, and he started toward the chutes. P. 125-126. No purpose but to get the tickets, appears as a cause of his going there, and it was the proper hour to go.

He is next seen at five p. m., at an ice plant. He jokes there with Jackson until about 5:25 p. m. P. 160. Then he goes to Hutchinson, at 5:25 p. m. and while conversing, a train from the south whistles, and Turner looking at his watch remarks that that is 24, and that he must go to the freight house and take his tickets and order coal for the chutes, and turns and goes off in the direction of the freight house. P. 119-240.

In a few moments he was run over and killed. P. 67. No coal tickets were found on his person. P. 55. There was a strong wind from the south, P. 66. It was a windy, blustery day. P. 57. His clothes were wet with sweat and dirty. P. 53. He had been shoveling coal. P. 123. The train which ran over him was moving at from 20 to 25 miles an hour, "coming in very fast". P. 74. There were 22 coal chute pockets. P. 131. No evidence appears how many trains coaled in the twenty-four hours. A

witness, after Turner was killed looked into a box and saw two coal tickets in that box, but did not look in the other. P. 148. Two trains, 24 and 2113, had come by the chutes after Turner had gone in the direction of the chutes soon after four o'clock. P. 126. The chief clerk, to whom Turner was accustomed to deliver the tickets, that evening after Turner was killed, went to the chutes to collect the tickets, as none had been turned in by Turner. P. 101. He found "some" coal tickets. P. 101. He does not say how many.

If Turner's clothing were so much soiled by the sweat and dirt as to spoil the coal tickets, and he held them in his hands, when he was struck, the high wind would have blown them away, or the fast moving train might do this. It could not be expected that he would still clutch them.

There is nothing in the evidence which contradicts this detail. Every item of evidence in the record on this point is printed. Defendant in Error contends that this satisfies the mind that he was going to the freight house to turn in his tickets and order coal for the chutes, that is he was going to report that the coal was all unloaded on the chutes, which was equivalent to ordering coal set up on the chutes.

Now, if under the decisions of the courts, particularly of this court, if that was doing an act of interstate commerce, then this point is made. The District Court of the United States

so held in remanding the cause, for without it there could be no remand. Such action strengthens the actions of the state courts in arriving at the same conclusion.

The case closest in point seems to be that of *Penderson v. Delaware, Lackawana and W., R. Co.* 229 U. S. 146, because in that case the injury happened while a sack of bolts was being carried to repair a bridge which was indiscriminately used in both interstate and intrastate commerce.

The coal tickets which Turner carried were proofs of the disposition of such coal as they indicated, which Turner had handled for both interstate and intrastate commerce. And they were necessary to show what was done with the coal and to keep the coal account. He must have had to report all the coal unloaded from the chutes that evening as he had been informed it was all unloaded, P. 120, and this report was specifically required of him by his contract. P. 23. Such report was necessary before more coal would be set on the chutes, and unless he made his report no more coal would be set up there, but it was necessary to keep a supply there, for both characters of commerce. They can not be separated. Just as in the *Pederson* case both were intermingled. It was this very condition that this court had in mind in the *Mondou* cases, 223 U. S. 1, when it was declared that what an injured man was doing must have some substantial connection with in-



terstate commerce. This connection is made more clear by this court in *New York Central and Hudson River Railroad Company, v. Bernard J. Carr*, decided June 14, last and reported in *Supreme Court Reporter* by West Publishing Co., in volume 35 at page 780, where these words occur on page 781: "Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury the employe is engaged in interstate business, or in an act which is so directly connected with such business as to substantially form a part or a necessary incident thereof." In approving in this case of *St. Louis, S. F. & T. R. Co. V. Seale*, 229 U. S. 156, where the clerk was taking down the memoranda of cars that had been running interstate though that was not the destination of that train, and, *North Carolina R. Co. V. Zachary*, 232 U. S. 248, where the engineer had prepared his engine to go, but left it presumably to go to a boarding house, and was killed, Defendant in Error believes that the rules there would bring this case under the Federal law. There are two very clear state decisions on this point: *Horton V. Oregon—Washington R. & N. Co.* 130 Pacific, 897, by the Supreme Court of Washington and *Montgomery V. Southern Pacific R. R. Co.* 131 Pacific, 507, by the Supreme Court of Oregon.

By remark, it is noticeable, that the Supreme Court of Oklahoma, in its opinion in this case, cites the Carr case as authority before the

decision of it by this court. Also, the Seale case and the Zachary case are both cited. Such must have been the view of the learned Judge of the District Court for the Western District of Oklahoma, also, in remanding the cause. The very fact that Turner was required to turn in the coal tickets, and that he was required to report all coal unloaded, connects his work of shoveling for interstate engines with reporting results. It was intimately connected with interstate commerce.

Defendant in Error does not seem to dispute, that if Turner was doing an interstate duty in shoveling coal, then his making report, and going to make report were interstate duties as well. The best that can be made of the allegation that he was not engaged in interstate commerce when killed is founded on the contention that he was an independent contractor, and not an employe.

For the reasons above stated it does not appear that Plaintiff in Error is in good faith making the claim that Turner when killed was not engaged in interstate commerce.

NEGLIGENCE.

When Turner walking northwest had stepped his left foot over the west rail and was in the act of stepping his right foot over and clearing the track, and then the brakeman gave a loud hallow and Turner turned to the right, looking east, and was then struck down by the train across the track, P. 76, we have a direct and simple demonstration of what an ordinarily prudent man should do under the same or similar circumstances. On this testimony the court. P. 247 gave this instruction:

"38. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman waited to give the signal until the deceased was in imminent peril and that instead of giving the train signal he gave a loud and piercing yell, which caused Turner to stop and throw himself in a position where he could not escape injury, as alleged in subdivision N. of the tenth paragraph of plaintiff's petition. Unless you believe that the acts of the brakeman were not the acts of an ordinarily prudent man, considering the surrounding circumstances as they appear from the evidence." "Given by the court and excepted to by the defendant, James W. Steen, Judge."

The fireman, Reems, saw Turner walking north between tracks two and three and suddenly disappear from sight, P. 224. Reems gave the engineer in the cab with him

no slow up signal, no stop signal, nor did he tell him what he had seen. P. 227.

On this the court gave this instruction:

"34. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the fireman in the cab with the engineman did not have the engine slowed or stopped when he saw the deceased entering on track two, until he should see that he had safely passed in the clear, as alleged in subdivision J. of the tenth paragraph of plaintiff's petition." P. 242.

It is not easy to understand how Plaintiff in Error can complain of this, especially since the Supreme Court of Oklahoma expresses the view that Defendant in Error was entitled to have this go to the jury. It did not go to the jury.

Defendant in Error had alleged the unlawful running of this train in violation of a statute of the United States, in that it was being run without using and operating its train power brakes, P. 40, and in paragraph P, of the complaint said:

He (it) was guilty of most culpable negligence in running its train in violation of the statute of the United States as heretofore detailed." P. 43.

Plaintiff in Error, on this obtained this instruction:

"40. The court instructs the jury that

there can be no recovery in this case upon plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the statute of the United States, as alleged in subdivision P, of the tenth paragraph of plaintiff's petition." P. 242.

Plaintiff in Error ought not complain of this.

The court had previously given 10, P. 241 and 18, P. 241-2, which submitted this question to the jury, but afterward, without withdrawing them,, gave 40 quoted above.

That the jury followed the court in giving 40, is shown by their verdict.

The widow had testified that, the damages suffered by all the beneficiaries, was greater than \$16,000. P. 133 to 143. The jury rendered a verdict for \$7,583, less than half the damages. P. 243-244. If they had found that the train was run unlawfully, they should have found for the full proof. But the proof was clear that Turner had stepped on the track to cross it, and the jury must have considered this an act of contributory negligence, and hence divided the amount, giving the company the larger part.

The Supreme Court of Oklahoma considered there was proof enough of this unlawful running to have submitted the matter to the jury, but it was not submitted.

All the evidence, however, is printed herein. It shows in a scattered way and in form, that the train power brakes were not

used or operated until a signal, all too late, was given, for after the air went on, this little train, 147 feet long, P. 233, ran a distance of 200 feet, P. 73, 80, 81, 183, 193, 203, 216, 220, before it stopped, when if running at the ordinance limit of ten miles an hour it should have stopped at 60 feet. P. 108, 110.

Defendant in Error was deprived by instruction 40, *supra*, of the right to have the contributory negligence eliminated, and it was not eliminated, but considered, and the damages divided. Plaintiff in Error can not complain.

This train was from 20 to 40 feet from Turner when the air went on, P. 197, 201, 216, 222, and the train itself was 147 feet long, P.233, and it passed entirely over him and from 12 to 40 feet beyond. P. 183, 193, 203, 231, the minimum showing 179 feet, the maximum, 227 feet, while the testimony, P. 109, showed that if running at 25 miles an hour it should have stopped in a very little over 150 feet. Every feature of the running of this train is taken from the testimony of the servants of Plaintiff in Error, and all that is herein set out is taken therefrom, except McBlair's testimony, which is not estimated above. Wallace, the engineer on the engine estimates that they ran 140 feet after the air went on, P. 183, and Reems, the fireman, at four cars lengths,

F. 231. Either would make the speed between 20 and 25 miles.

As there was abundance of evidence of the negligence of the defendant in the brakeman's yell, and the fireman's neglect, the ones who had the last clear chance, Turner not knowing of his danger, the submission to the jury, and its finding, seem correct. This court, and appellate courts in general, do not disturb the verdict if supported by evidence, and this verdict is well supported, even after Reems' failure to act, was withdrawn by the court from the jury, P. 242, and also the withdrawal of the unlawful running of the train. P 242.

This being the last of the propositions, and it being without merit to support the contention that there was no evidence showing liability under the Federal act, it would seem that Defendant in Error is in law, and under the rules of this court entitled to have his motion sustained.

This court decided the McWhirter case six days after this action was originally filed. Less than six months thereafter, the Plaintiff in Error, at the close of evidence in writing requested the court for an instructed verdict. P 242. The refusal entitled Plaintiff in Error to review, provided the contention was *bona fide*. If not *bona fide*, then requesting for a peremptory instruction, was taking advantage of a form approved by this court where the contention is in good faith. It is hardly to be

conceived that to occupy the position that the Federal act is not the law of the case, that it could be held that such request, and its refusal, constitute the assertion of a right under the law of the United States, entitling the party to review.

The antagonism toward the law of the United States, asserted in the beginning, practiced all through the case, and now sought here for review, seems like asking this court to extend its jurisdiction beyond the limitations of the statute.

Defendant in Error respectively asks the court to sustain his contentions, that the appeal is brought here for delay, and that whether or not Turner was an independent contractor is so frivolous a question as not to need further argument.

Respectfully submitted,  
JOHN C. MOORE,  
Attorney and Counsel for Defendant  
in Error.



VERIFICATION OF PRINTED RECORD.

STATE of OKLAHOMA, } ss  
COUNTY OF GARFIELD, }

John C. Moore, of lawful age, being first duly sworn, on his oath states that he is attorney and counsel for Defendant, Bond, in this cause, That the "Appendix," immediately following is a true copy of a portion of the record of this cause as the same now appears in the hands of the Clerk of this Court. This affiant has carefully compared the said printed "Appendix," with the record in his hands as furnished him by the Plaintiff in Error, and that said printed "Appendix," is in all things a just, true, full and correct copy of such portions of such record as affiant thinks necessary for the consideration of the motions to Dismiss and to Affirm.

JOHN C. MOORE.

Subscribed and sworn to before me this  
16th day of October, 1915.

(SEAL)

GEO. M. SCIFRES.

Clerk District Court, Garfield County, Oklahoma.



# APPENDIX

## STATEMENT: THE PLEADINGS

June 4, 1913, the Defendant in Error, A. P. Bond, Administrator of the Estate of William L. Turner, deceased, filed his action against Plaintiff in Error, in the District Court of Garfield County, Oklahoma, the complaint being as follows:

IN THE DISTRICT COURT OF GARFIELD  
COUNTY, OKLAHOMA.

A. P. Bond, Adminis-  
trator of the Estate  
of William L. Turner,  
deceased, Plaintiff,

v.

Action For Damages

Chicago, Rock Island  
and Pacific Railway  
Company, a corpora-  
tion, Defendant.

### PETITION.

The plaintiff states that William L. Turner departed this life on the 28th day of July, 1912, at Enid, Garfield County, Oklahoma, leaving as all and his only heirs, his widow, Ida M. Turner, residing at Enid, Garfield County, Oklahoma, Nellie Munger, a daughter, aged twenty-two years, now residing at Creston, in the State of Iowa, and, Annie Foley, a daughter, now aged twenty years, Vera Turner, a daughter, now aged fifteen years, Mary Turner, aged ten years, Dorothea, a daughter, aged eight years, William L. Turner, a son, aged six years, Bessie Turner, a daughter, aged four years, and Austin L. Turner, aged one year, a son, and residing with

their mother at Enid, Garfield County, Oklahoma.

That thereafter, to-wit: On the 4th day of June, 1913, this plaintiff was by the County Court of Garfield County, Oklahoma, duly and legally appointed Administrator of the estate of said William L. Turner, deceased, the said court then and there having full power and authority to make said appointment, and thereupon and before filing this action he duly and legally qualified as such, and entered upon his duties as Administrator, and as such Administrator he brings this action for the benefit of said widow and children. He further states that he is an actual resident of Garfield County, Oklahoma.

That the Chicago, Rock Island and Pacific Railway Company, defendant, is a common carrier, engaged in interstate commerce by railroad and as such owns and operates a line of railway through Kansas, Oklahoma, Texas and other states, and has so owned and operated said line continuously for many years to the present time, and is now so owning and operating same, and was so doing on the 28th day of July, 1912, when William L. Turner, deceased, was killed through the negligence of defendant as hereinafter set out. That said line of railway track passes through Garfield County, and through the incorporated limits of the City of Enid, Oklahoma, as do all other tracks and lines of said road hereinafter described.

That said defendant, railway company, has at all such times maintained within the corporate limits of the city of Enid, in Garfield County, Oklahoma, its main line and a series

of tracks, nine in number, for switching, passing, loading and unloading and for other necessary purposes, at the point where the freight house stands, east of it for the purposes named. They are successively, beginning at the freight house and following, east, as follows: The house track, which is for the immediate accommodation for loading and unloading freight at said freight house, the main line track, on which all trains enter and leave the city, the passing track used to allow trains to pass each other, track number one, track number two, track number three, track number four, all of which are for switching and other general purposes of said company in making up its trains for interstate and local traffic, and track number five for similar purposes, and the last track, which terminates on the north as a dead track, that is having no communication at that end with any other track, and can be entered upon only from the south. The house track runs north from the freight house and soon joins the main track, between the freight house and the passenger depot. The main track passes the depot immediately next to its platform. At the south end of this platform stands a watering spout, at which engines stop to obtain water. All the other tracks are parallel, nearly north and south for a considerable distance, so as to accommodate a number of large trains at once, and still leave room for working all business, but on the north and on the south they gradually approach the main track, to which they are all joined within the city limits. The distance from the north to the south limit of these tracks is about a half mile. The southern limit is at or very near a structure which the defendant maintains for un-

loading coal, called the coal chutes, into which coal is unloaded for the general use of all engines of defendant in use on the road, local and interstate, which structure is hereinafter more particularly described. On the north they extend beyond Market Street a considerable distance, which street crosses the main line and switches about one hundred feet north of the passenger depot, and runs east and west. Passenger train number twenty-four, which in the whole of August and July, 1912, had its schedule for Enid at or soon after five o'clock in the afternoon, daily, coming always from the south, stops at the water spout above named, and its rear is a short distance north of the freight house, and when it pulls up to the depot, the engine stands a distance north of said Market Street. At such times it gives the signal for crossing a highway, while when further south, coming past the coal chutes and freight office it makes many signals with its whistle and its bell, and is creating a very great amount of noise and confusion as to sound by the application of air to the breaks, and the clanging of cars, the escape of air and steam, and crowns all other sounds of ordinary character, and mingles its signals with any other signals that may at the time be given by other engines or trains that may at the time be in the yards. This confusion of sound, hustle and bustle most occur when slowing up to take water at the watering spout above described. The foregoing details are made that the court may more fully understand the pleas regarding negligence of the defendant, its carelessness, the incompetence of its employees and servants, and the wanton and wrongful acts on their part, in running the train number twenty-four,

which caused the death of said William L. Turner.

That the City of Enid is a City of the First Class under the definitions of the statutes of the State of Oklahoma, and has adopted a charter under and by virtue of power granted by the Constitution and laws of Oklahoma, among which powers is that to regulate the speed of all trains within the limits of the City or Enid, whether on the main line or on the switch tracks within its limits, and that in pursuance of such power it has fixed the speed of such trains, beyond which it is unlawful to proceed.

That the plaintiff, further states, that William L. Turner, deceased, at the time of his death was in the service of the defendant, corporation, under two distinct and separate written contracts, one for unloading coal into the chutes as erected and maintained by defendant to supply coal to its engines engaged in pulling trains engaged in interstate commerce and also to those for the switch yards, herein called the unloading contract, also for unloading cord wood and sand for the defendant, and for loading waste cinders about the switch yards, a copy of which contract is hereto attached as Exhibit "A" and by this reference made a part of this petition. That the immediate duties of said contract required that he should determine when a car of coal was needed to the chutes in order to keep up the supply, and to order same set in, and that when so set in that he should proceed to unload same into the chutes for the use of all engines of the road, interstate and intrastate, there being use of interstate engines to one for local or daily as many as five engines taking coal for

intrastate use. Other duties imposed by said contract, though not enumerated therein were to cause to be set in for different customers, coal cars and cars with other loads, for unloading at the sides of the track, which necessitated visits to all parts of the switching yards. That enginemen, and others in charge of engines, whether running engines engaged in interstate commerce over said road or for mere local traffic, were required to replenish their engines with coal from the said chutes when necessary, and on so doing, were required to deposit in a box fixed there, cards, on which were entered the engine number, the name of the person in charge of same and the amount of coal taken from the chutes and such other facts as the company required. That at about the hour of five o'clock in the evening of each day the deceased, by said contract, was required to take such coal tickets from said box, and soon thereafter turn them in at the freight office of the company at the freight house above described.

Regarding the other contract, herein called the cooperage contract, a copy of which is hereto attached and marked Exhibit "B," he was required by its terms to examine cars in all parts of the said yards to determine whether they were in condition to transport grain without leakage from Enid to other points within and without the State of Oklahoma, and if found unfitted for such purpose he was required to make such repairs under minute specifications as would render them safe from leakage of grain, which duties also called him to all parts of said yards and placed him on duty repairing cars for interstate commerce. That his duties thus generally appertained to the



operation of an instrumentality for interstate commerce, to-wit: the operation of the coal chutes, the delivery of the coal tickets, and the repairs of interstate cars. That in the general discharge of his duties he was in fact principally and constantly engaged in duties connected with and furthering of interstate commerce, in the service of the defendant, railway company, which company was at all the times mentioned engaged in interstate commerce over said line of road and over all its switch tracks in said city, including track two hereinafter more particularly described.

That on the 28th day of July, 1912, at about the hour of five o'clock in the afternoon, he had taken the tickets from this box; the whole south end of the switch yards from the freight house south to the chutes, and to the lower or most southerly limits of the switch tracks, was entirely free, clear and wholly unoccupied by any engine or cars, the nearest being some empty cars a quarter of a mile to the north, and occupying solely the ninth or dead track on the far east of the switching yards, and by the side of the White Mill, hereinafter named. There was at the time a strong wind blowing from a direction a little west from south, and of such character that smoke from engines, factories and mills was blown to or near the ground, instead of rising high and clear into the upper air. The general trend of all the switch tracks was more nearly to the south than the direction the wind came from, so that the wind crossed the tracks in a long angle. From the chutes, after obtaining the tickets in the box, he went toward the north and east until he came to a car on the dead track, standing further south than any other

car, and into which he had men loading coal from the ground. There, from his helper, he obtained some coal tickets taken out a little earlier, and went north to the white mill, which stands across all the tracks from the freight house and a little further north. There he arranged with the fireman of that mill to set in a car of coal, and while conversing a train whistle for the station sounded, when Turner took out his watch and said, "That is twenty-four, I must go and turn in these coal tickets," and immediately started away. By reason of the cars standing on the dead track he was compelled to go some distance to the south before crossing that track, but when he did so he was farther south than the north end of the freight house where he must enter. He had long been in the service of defendant company and was thoroughly familiar with all character of train signals at stations and in yards, reading and understanding them instantly, and depending on them for information instead of unknown or unprescribed acts, sounds or noises. He passed around the cars on the dead track, and as he reached a point where he was ready to cross over the main track, train number twenty-four, a finely equipped and large passenger train was coming in from the south, just passing the coal chutes and south ends of the switch tracks giving its signals with whistle and bell, making much steam and smoke, and much noise, and clanging, escape of steam, putting air on the brakes, and hustle and hurry, on the main track. The strong wind carried the smoke and steam near the ground and hid all objects which it engulfed. That among such objects thus hidden, were road engine number 2113 just in from

Kansas with a special train which it had uncoupled from, at the north end of the switches, except two box cars and one or two flat cars attached, had proceeded from the north to the south end of the switches while Turner was at the white mill, and unobserved by him, and had just entered upon the switch at the south out of the way of twenty-four coming in on the main line. Of this engine and cars, Turner was wholly unaware, and believed from his recent presence at the chutes that no cars of engine were in that part of the switch yards, except twenty-four coming in on the main line. He was confirmed in this that all seemed clear, as nothing appeared on any of the tracks, visible outside the steam and smoke which twenty-four had made. At about that moment he was rounding the south end of the standing cars on the ninth track, and crossed that, and five, four and three and there, between two and three, he proceeded north between the tracks until he should arrive at the point where he should cross over the other tracks to the freight house. He could see, only twenty-four, and it was rapidly coming up the main line toward him but three tracks further over. The engine, 2113, and its little train were not visible to him, nor he to them until about two or three car lengths to the south of him, the fireman on this engine and a brakeman on the end of the advancing flat car saw him walking north between the tracks two and three, but he did not discover them, his back being toward them. They gave him no signal, rang no bell, blew no whistle nor made any sound, all the time rapidly advancing toward him at a rate of twenty miles an hour, and in no way notifying him of their presence or advance. Plaintiff states that

the deceased was then and there, and until his death, wholly unaware that there were any engine or cars south of him on any of the switch tracks, and that from his own recent presence at the chutes a few minutes before he personally knew that none were then there, and that none were visible there when he commenced to cross the tracks, and that he had good reason to believe that no engine was to the south of him on any of the tracks except that pulling twenty-four into the station.

That amidst the smoke and steam of twenty-four, this engine, number 2113, began to back as twenty-four passed it, and in so doing remained for a considerable time and distance engulfed in the steam and smoke of both engines and was invisible. It was so backing while Turner was walking north between track two and track three, and as they emerged from the smoke he became visible to the fireman and brakeman, but he had not observed them. At this time twenty-four was running up toward the watering spout, and slowing up with much noise and confusion, which drowned all other noises on account of the volume and variety of it. That the advancing switch engine gave no signals of any kind, neither ringing its bell or blowing its whistle, nor slowing its speed nor giving any signal but running parallel with and close to twenty-four and at a higher rate of speed than is allowed by the ordinances of the City of Enid, so that the calamity which then and there occurred was plainly visible from the car windows of twenty-four. During their approach to Turner no train signal was given to him warning him of their coming, the brakeman gave the engine man no signal, and the fireman gave him none, and the brakeman

carried no flag or other appliance with which to signal either the fireman or the engineman but continued to advance. That so soon as Turner had arrived at the point where it was proper to cross track two, he entered thereon, under the eyes of the brakeman and the fireman, but they were unseen and unobserved by him, as was also, the train they were on. The brakeman, though quite near to him, seeing him enter on the track to cross it made no signal to the engineman to stop, nor to go slow, and in fact was not in sight of the engineman, keeping too much to the centre of his car so that the engineman could not see him. The fireman gave the engineman no signal to stop or go slow until he could know that Turner had passed safely over, so that the engineman was unaware of the danger, but it was fully known to the fireman and the brakeman. Neither of them gave Turner any signal of any kind to attract his attention, notifying him of their presence nor advance, nor of his danger, as he was about to enter on track two, and as he did enter on said track to cross it. Plaintiff states that on hearing a train signal of any kind that the deceased not only well understood it, but became immediately obedient to it, was cool in the presence of danger and cool in his conduct at such times, prudent and judicious. That if a signal, a train signal of any kind had been given warning him of danger that he would at once have been obedient to it and would have done what a trained railroad man would do on hearing such signal.

That he was seen by the said fireman and the said brakeman to leave the space between the tracks where he had been walking, and to enter on track two to cross it at a point about

fifty feet east of the freight depot, with train twenty-four coming in toward the watering spout just about twenty-five feet ahead of him and on another track to the west while they with the flat car were a number of feet from him, and seeing that he had not observed them nor knew of their presence, and far enough to have stopped entirely, or to have slowed in their advance, but they gave no train signal, gave him no signal, the brakeman gave the engineman no signal, the fireman gave the engineman no signal, the brakeman did not carry a flag or other appliance with which to make signals, they did not slow up nor stop but came rapidly on, while if any such steps had been taken he would have been saved from injury.

Plaintiff further states, that as it was the deceased would have passed in the clear without the giving of the signals, but for the egregious blunder and act of folly and incompetence of said brakeman, who lost his head and did an act, which was the immediate and approximate cause of the death of said Turner, then and there. After entering on track two to cross it Turner was wholly unconscious of the approach of the flat car and in the belief that no movable cars were south of him, and the approaching cars were not making noise sufficient to be heard in the confusion and noise of twenty-four, and no train signals were given, he stepped on toward the west side but northerly, so that he was going about due northwest toward which his face was, with his back toward the southeast and toward the advancing flat car. He had advanced so far that he stepped his left foot over the west rail and set it down on the ground, having just before set his right foot down just within the west rail,

and was in the act to raise his right foot and step clear over the west rail and off the track entirely, and in the clear and out of danger, notwithstanding he had had no warning and was unaware of danger, and would not have been struck nor injured in any way but for the fatal act or folly, incompetence and negligence of the said brakeman, who suddenly, without any warning or signal, gave a loud and piercing yell at the top of his voice and which was heard at the passenger depot, and even at the car windows of twenty-four. Turner's face was to the northwest. He was unaware of the approaching flat car. Hearing the yell, instead of stepping his right foot over the west track, he did not move his feet, but turned on his knees and hips toward the right to see and learn the cause of the yell, and thus he was stopped in his progress across the track. This motion threw his weight on his right leg, and twisted his body so that he was in a strained position, and before he could recover his balance he was struck by the advancing flat car, presumably by the west bumper and thrown entirely down upon his face and the front part of his body, his left leg still over the west rail and his right kinked and the foot very close to the west rail but within the track. His left foot was cut off above the ankle and lay a foot or more outside the west rail, his body extending to the east and clear across the track, with his head cut off by the east rail as low down as the eyes, and he was instantly killed. That from the place of his being struck until the engine and cars came to a stop was more than three hundred feet the cars ran.

That in pushing said cars by said engine No. 2113, as hereinbefore set out, and by which the

said William L. Turner was killed, the said engine and cars, and as a train, were operated and used by the engineman and train crew in violation of a statute of the United States, to-wit: Section 2 of an Act to amend an Act entitled, an Act to protect the safety of employees and travelers upon railroads by common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel breaks and for other purposes, approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, in that no continuous train power breaks were operated or used by the engineer or other person in charge of said engine No. 2113, while backing up on track two as heretofore stated, nor at any time before the whole of said train, after throwing said Turner down as aforesaid had passed entirely over his body, and that the speed of said engine and cars was not under the control and power of said continuous train power brakes, but was proceeding under the force of the engine, pushing, and such power brakes were not then and there used and operated to control the speed, nor for stopping, nor for any other purpose. That said act was in further violation of said statute in this, that it was in violation of a rule of the Interstate Commerce Commission of the United States made on the 6th day of June, 1910, made under and by virtue of the requirement of the said section above named, directing said order to be made; that for the reasons above stated the train was not controlled in its speed, and this caused said train to strike, kill and pass over the said William L. Turner.

Plaintiff has reason to believe that the



several cars and the engine of said train were not connected up with the continuous train power brakes, and hence not under the control of the engine or engineman, and that same was negligence and violation of said statute, and plaintiff, without asserting that this is true, asks the court to diligently inquire into the facts thereof.

Having thus in detail given a description of the situation of the grounds, and a statement of the acts leading up to the killing and the killing itself, plaintiff now says: that the deceased, William L. Turner was killed by the defendants negligence, carelessness, wrongfulness and unlawfulness, and the incompetence of its servants, agents and employees, while it was engaged as a common carrier in interstate commerce, by railroad and while the said de-William L. Turner was in the service of said defendant engaged in interstate commerce, and that the several of such acts are as follows:—

1. By starting the switching train while twenty-four was coming in on a track parallel thereto and running close together.
2. By starting and running in such proximity amid the smoke and steam which obscured it.
3. By failing to give the blasts from the whistle which the rules require before backing
4. By neglecting, under the circumstances to ring the bell and sound the whistle frequently while so backing.
5. By continuing to back before twenty-four came to a stop.
6. By commencing to back at a time and continuing to do that its signals, if given, were likely to be commingled with those of twenty-

four, and to be incapable of being understood, thus causing confusion, in the interpretation, and endangering those who might be near.

7. By the fact that its signals, if sounded, would be intermingled with those of twenty-four and be misunderstood.

8. By failing to signal Turner, when seen walking between tracks two and three, to notify him of their presence and approach.

9. When seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger.

10. By the fireman in the cab with the engineman not having the engine slowed or stopped when he saw Turner entering on track two, until he should see that he had safely passed in the clear.

11. By the brakeman in the flat car when he saw Turner entering on track two failing to signal the engineman to stop or go slow until he could see that Turner was in the clear.

12. By the brakeman not having in his hand any flag or other device for signaling the engineman or the fireman such as the rules of the company require brakemen to have when performing that class of duties, at all times.

13. By the brakeman being out of sight of the engineman and keeping out of his sight so that no signals could be seen if made.

14. By the brakeman in waiting to give signal to Turner until in imminent peril, and then, instead of remaining silent that he might pass in the clear, he gave a loud and piercing yell, which caused Turner, who was unaware of danger, to stop and turn, and thus lose val-

uable time to pass in the clear and also to throw him in more danger than before.

15. By thus stopping him in a place of peril until he was struck and killed.

16. The engineman was guilty of negligence in running his train in such high speed and in excess of the ordinances of said city, so that he could not slow it down or stop it netirely in a very few feet.

17. That he was guilty of negligence in so running his train at such speed in the switch yards and not constantly ringing his engine bell, and sounding the whistle.

18. That he was at fault and negligent when he found that his brakeman was not in sight, that he did not stop his train and go to the brakeman and require him to keep in sight, that his signals could be seen.

19. That said train crew had abundant opportunity to have saved the life of Turner, but did not seize such opportunity.

Plaintiff says that the deceased, William L. Turner, in no way contributed toward the injury, nor was he in any way negligent in the premises.

Plaintiff therefore says, that the defendant while engaged in interstate commerce, by the careless, negligent and wrongful acts of its agents, servants and employees as above set out and detailed was guilty of negligence, carelessness and wrongful running of said engine No. 2113 in backing in said switch yards and pushing said cars and engine over and killing him, the said William L. Turner, when at the time engaged in interstate commerce in the service of the defendant, in said switch yards in the City of Enid, in Garfield County, Oklahoma, as heretofore stated, and not through any contrib-

utory fault or negligence on his part.

That the deceased, William L. Turner, was at the time of his death at the age of forty-six years, and that he had an expectation of twenty-four years, being at the time a sound, hearty and healthy man, and had all his life been so, and that for twelve years preceding his death he had earned annually the sum of Fifteen Hundred Dollars, and was so earning on the day of his death, and that said death as so stated is a cause of damage to said widow and children in the sum of Thirty-five Thousand Dollars, for judgment for which plaintiff prays and for costs of suit.

JOHN C. MOORE,  
Attorney for Plaintiff.

#### EXHIBIT "A"

This agreement, made in duplicate this first day of November, A. D. 1910, by and between the Chicago, Rock Island and Pacific Railway Company, a corporation, party of the first part, hereafter called the "Railway Company," and W. L. Turner, of Enid, Garfield County, Oklahoma, party of the second part, hereafter called the "Contractor."

#### WITNESSETH, THAT:

The parties hereto, for and in consideration of the covenants and agreements hereinafter set forth, and for the payment hereinafter provided for, covenant and agree, each with the other, as follows:

First: The Contractor covenants and agrees, at his sole cost and expense, to furnish all the labor required and necessary to handle: and,

(a) To handle all the coal required by

the Railway Company at Enid, Oklahoma, from either open or closed cars, or both, and to place same in coal chute pockets of the Railway Company; to gather up all coal that falls from the coal chute pockets to the ground and place same on cars or engines as desired by the Railway Company.

(b) To break all coal to the size of four inch cubes or less before same is delivered to chutes or engines for engine use and to unload all coal for stationary boilers.

(c) To unload wood from cars to storage piles located on Railway Company's right of way in said city.

(d) To load cinders from said Railway Company's right of way to cars, at points designated by said Railway Company.

(e) To unload sand from cars furnished by said Railway Company at points designated by said Railway Company.

Second: The Railway Company agrees to pay to the Contractor in full compensation for services herein provided for, and the Contractor agrees to accept the following rates, to-wit: Nine (9) Cents per ton for unloading coal from cars to chutes; Nine (9) cents per ton for unloading coal known as "chute droppings;" from the ground to cars. Provided, that where the cars so loaded shall be unloaded into the chutes the railway company shall pay an additional six (6) cents per ton for unloading such coal from cars to chutes.

Ten (10) cents per cord for unloading wood from cars to the storage piles of said Railway Company, said storage piles being located on said right of way in said City of Enid.

Eight (8) cents per cubic yard for unloading cinders on said Railway Company's right

of way upon the cars furnished for same by said Railway Company at the place where said Railway Company places said cars.

Eight (8) cents per cubic yard for unloading sand on said Railway Company's right of way upon the cars furnished for same by said Railway Company at the place where said Railway Company places said cars.

Eight (8) cents per cubic yard for unloading sand on said Railway Company's right of way for use of its engines.

It is expressly understood and agreed that the payment for all services in handling said coal from cars; said coal from ground under chutes, known as "chute droppings;" said wood from cars for storage piles; said cinders for cars; said sand for engine purposes, shall be made upon the estimate and records of the Railway Company as to the amount of coal handled from cars, coal handled from the ground under chutes, wood handled from cars to storage piles, cinders loaded into cars and sand handled for use of engines.

Third: The Contractor shall at all times maintain a sufficient supply of coal in the pockets of the coal chutes at Enid, Oklahoma, for the requirements of the Railway Company, and shall break or crack all coal to sizes suitable for burning as shall be required by the Railway Company.

Fourth: The Controctor hereby expressly assumes all liability for all injuries to or death of persons in his employ. and all liability to, or loss of, his property which may occur in the performance of this agreement, whether the same shall be occasioned by reason of the negligence of the Railway Company. its agents or employees, or otherwise, and the Contractor

further covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, losses and recoveries for or on account of any such injury to or loss of property, or for or on account of any injury to or death of persons in the employ of the Contractor when and while said person may be in, upon or about the cars, engines, trains, tracks and premises of the Railway Company, and any injury to said Contractor while performing any services under this contract, which might be or have been delegated to his agents or employees.

The Contractor further expressly assumes all liability for injuries to or death of third persons, including the employees of this Railway Company, and all liability for injury to or loss of the property of such persons, which may be occasioned by any act of omission or commission, negligent or otherwise, of the Contractor, his agents, servants and employees, while engaged in the performance of this agreement, and the Contractor covenants and agrees to forever protect and save harmless the Railway Company of and from all claims, damages, expenses, costs and recoveries, for or on account of any such injuries or death of third persons, or for or on account of injuries to or loss of property thereof; and the contractor further covenants and agrees that the Railway Company shall not be liable in case of his death or injury while employed in the work herein set forth.:

Fifth: The Contractor shall be punctual in the performance of his duties under this contract, and shall keep a sufficient number of men employed to unload the coal from cars into the coal chute pockets without unnecessary de-

lay, and without causing the Railway Company any inconvenience or damage.

Sixth: This contract shall begin on the date hereof, and shall continue until terminated, as it may be by either party giving to the other fifteen (15) days' notice, in writing, of an intention to terminate the same, which notice shall specify the date on which the same shall terminate, unless said contract shall be sooner terminated as hereinafter provided.

Seventh: If at any time the Contractor shall fail, refuse or neglect faithfully to perform his duties under this contract, it is hereby agreed that the Railway Company shall have the right and option to at once terminate this contract, without being liable in damages therefor to said Contractor. The Railway Company, acting by its General Manager, or other agent authorized by him, shall be the sole judge as to whether the Contractor is faithfully and satisfactorily performing the duties herein prescribed to be performed by him.

Eighth: The Railway Company agrees to furnish for the use of the Contractor, in performing the services required hereby, the necessary tools, including shovels, coal picks, lanterns, torches and oil for use of the men employed in handling coal through the chutes at Enid, Oklahoma. All such tools, supplies and appliances shall be and remain the property of the Railway Company, and at the termination of this contract shall be returned to the railway Company by the Contractor, in good order and condition, ordinary wear and tear resulting from the proper use thereof excepted, and excepting also the oil properly used in order to carry out the provisions of this contract. In the event that any such tools or



appliances shall be destroyed or injured so that they are unfit for use by any act of the Contractor of his employees, or if they shall be lost or stolen, then in either case, the Contractor agrees to pay the Railway Company the cost of said tools or appliances so destroyed, damaged, lost or stolen, and agrees that the Railway Company may deduct the amount of such cost from any payment or payments to be made by it to the Contractor.

Ninth: It is hereby agreed and understood that the Contractor shall be deemed and held as the original contractor, and the Railway Company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.

Tenth: The Railway Company shall keep a record of all coal delivered at the coal chutes at Enid, Oklahoma, for unloading, giving car numbers and the number of tons of coal in each car unloaded shall be determined by the billing of such car, and the Railway Company shall make settlements and pay the Contractor for handling such coal upon the basis of such handling. The Contractor shall make daily reports of the cars unloaded by him, and shall receive, collect and deliver to the duly authorized representative of the Railway Company, a ticket from each engineman, hostler or other employee, showing the number of tons of coal delivered to any engine.

Eleventh: Payment for the work to be performed under the contract by the Contractor shall be made by the Railway Company monthly, on or before the twentieth day of each month, next succeeding that in which the work is performed.

Twelfth: This contract and all the terms

and conditions, rights and obligations thereof shall inure in favor of and be binding upon the heirs, administrators, executors, legal representatives and successors and assigns and lessees of both parties hereto; but the Contractor agrees that he will not assign or sublet any of the work herein provided for without the written consent thereto of the Railway Company.

In Witness Whereof, the Contractor has hereunto set his hand and seal and the Railway Company has caused this contract to be signed by the proper officer and its corporate seal to be hereunto affixed and attested, the day and year first above written.

Executed in duplicate.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY.

By W. M. WHITTENTER,  
Its General Manager.

Seal—Attest:—

CARL NYGUIST,  
Asst. Secretary.

W. L. TURNER,  
Party of the Second Part.

Witness to the signature of

Party of the Second Part:

LORRA MEAN,  
JOHN R. WEISSINGER.

Form A approved  
THOS. R. BRUNN,  
Asst. General Attorney.

Form G62 attached and marked  
"Approved."

R. J. Roberts as to firm  
WM. F. HENRY  
T. H. BEACOM

EXHIBIT "B"  
COPY.

This agreement, made in duplicate and entered into this first day of October, 1911, by and between the Chicago, Rock Island and Pacific Railway Company, hereinafter designated "First party," party of the first part, and W. L. Turner, of Enid, Garfield County, State of Oklahoma, hereinafter designated "Second party," party of the second part, Witnesseth:

Whereas, the first party owns and operates a line of railroad into and through the City of Enid, Garfield County, Oklahoma, and is engaged in transporting, among other things, grain in bulk; and,

Whereas, in the transportation of such grain it is necessary that the cars used therefor be prepared or coopered in a certain manner, so as to contain and prevent loss to such grain; and,

Whereas, the first party is desirous of having all cars necessary for use in such transportation at the City of Enid, Oklahoma, so prepared and coopered, in accordance with its rules and regulations with reference thereto; and,

Whereas, the second party is willing to perform such service for the compensation, in the manner and upon the terms and conditions hereinafter stated.

Now, Therefore, in consideration of the premises and of the stipulations and agreements herein contained to be by the parties hereto respectively kept and performed, it is mutually agreed as follows:

First: The second party shall prepare and cooper all cars which the Round House Foreman of the first party, at Enid, Oklahoma, may

direct to be so prepared, in the manner and in accordance with the following rules, to-wit:

(a) **Installing and Burlapping Grain Doors:** Apply three standard grain doors to each car door and fasten to posts, using four No. 8 common wire nails in ends of each grain door. Cover with 7 1-2 oz. burlap, one strip 8 feet long, 40 inches wide, and one strip 8 feet long, 20 inches wide, allowing it to overlap ends of grain door 6 inches and hang loose at bottom, overlapping car floor 10 inches; also lap two inches where strips are joined on the doors. Attach burlap by applying two No. 3 lath lengthwise where same is joined and two laths at top. Burlap at ends of grain doors to be secured with one and one-half lath at each end. Use five No. 4 common wire nails to each full lath.

(b) **Burlapping Ends of Car:** Apply one strip of 7 1-2 oz. burlap 12 feet long and 40 inches wide at each end of the car, allowing it to hang loose at bottom and overlap car floor 10 inches, extending around each corner of the car and overlapping the sides 21 inches. Secure to end and side of car with four No. 3 common lath applied at top and ends of burlap, using five No. 4 common wire nails to each full lath.

(c) **Burlapping King Bolts:** If King Bolts protrude through floor of car, place one strip of 7 1-2 oz. burlap 20 inches wide and 40 inches long, double over each bolt and secure with lath.

(d) **Patching Defects in Floor and Lining of Car:** Place a piece of burlap over opening or defect and nail a board over same of proper size, allowing the burlap to extend over several inches around the edges of the board.

(e) **Cars Unfit for Grain Loading:** Cars with broken end posts, loose side sheathings,

leaky roof or other defects, making them unsuitable, must not be coopered for grain loading.

(f) Making Lining and Sheathing of Car Grain Tight: Attention must be given to crevices and openings around the side posts and body braces at the belt rails. Where these posts and braces and brace rods pass down behind the linings, crevices are frequently found; these should be calked with oakum or some like material to prevent grain from leaking behind the lining. A strip of burlap should be applied to the sides of the car 36 inches long and 20 inches wide, just over the body bolsters, on account of the strain that is on the car at this point, frequently causing sheathing leaks.

(g) Applying Inspection Card (Form 333) to Cars for Grain Loading: Inspectors Card (Form 333) must be placed on the car showing that it has been placed in condition for grain loading. This card to show the name of the inspector, station at which inspected, date, car number and initials.

Second: That all cars so prepared by the second party shall be inspected by the Round House Foreman of the first party, at Enid, Oklahoma, who shall be the sole judge as to whether such preparation is in accordance with this contract. If it be determined by said Round House Foreman that the preparation of such cars is insufficient and not in accordance with the rules herein stated, the second party will do everything necessary to make the same conform to said rules.

Third: The first party will furnish to the second party all materials, of every kind, and will pay to the second party, for the services rendered, thirty (30) cents for each car so pre-

pared and coopered by him, such payment to be made on or before the 20th day of the month next succeeding that in which the service is performed.

Fourth: The second party agrees in all respects to fully indemnify, save and keep harmless the first party from any and all liability, loss, damage or injury of any kind whatsoever to the property of the first party, or to the property of others in its possession, as a common carrier or otherwise, or to the property of others on or adjoining its right of way, or on account of injury or death of the employees or passengers of the first party, or on account of injury to or death of others, arising from or in any manner caused or growing out of the preparation of cars for cooping and connection with the cooping of cars as provided herein, including the installing and burlapping of grain doors, burlapping the ends of the car, burlapping of king bolts, patching defects in the floor of car or lining car or during general repair of car to make the same fit for holding grain or in connection with such repair, or making lining or sheathing of car grain tight or in connection with any other work or preparation in and about cars, as covered by this contract, during the life of the same, irrespective of whether or not such liability, loss, damage or injury shall arise from the negligence of any such employees, passengers or persons.

Fifth: This agreement shall be effective from and after the date of its execution, and shall continue in full force and effect until terminated by either party hereto giving to the other thirty (30) days notice in writing of its intention to so terminate the same.

In Witness Whereof, the first party has

caused this agreement to be executed in its name and by its duly authorized officer and its corporate seal to be hereunto affixed and attested by its secretary, and the second party has hereunto set his hand and seal on this, the day and year hereinabove written.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY.

By C. MYERS,  
Its General Manager.

W. L. TURNER, (L. S.)

Seal—Attest:

EARL NYGURET,  
Asst. Secretary.

Witnesses:

T. H. WALLACE.  
J. A. BOWMAN.

Form Approved  
THOS. R. BRUNN,  
Asst. General Attorney.

Form G62 attached on which are written  
Approved, R. J. Roberts, as to form.

J. M. GEE.

T. H. BEACOM.

A. P. Bond, Administrator of W. L. Turner,  
v.

C. R. I. & P. Ry. Co.

PETITION.

Filed June 4, 1913. Geo. M. Scifres, Clerk  
District Court, 1:30 p. m.

Lien claimed for John C. Moore.

Endorsed.

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That thereafter the Plaintiff in Error,  
June 24, 1913, filed its petition for removal to  
the United States District Court for the West-  
ern District of Oklahoma, which is as follows:

IN THE DISTRICT COURT OF GARFIELD  
COUNTY, STATE OF OKLAHOMA.

A. P. Bond, Administrator of the Estate of  
William L. Turner, Deceased, Plaintiff,

vs.

The Chicago, Rock Island and Pacific Railway  
Company, a corporation, Defendant.

No. 1452.

PETITION FOR REMOVAL.

To the Honorable District Court in and for  
Garfield County, State of Oklahoma:

Comes now your petitioner, The Chicago,  
Rock Island and Pacific Railway Company, the  
above named defendant, by its attorneys, and  
respectfully represents to this Honorable Court:

First: That on the fourth day of June,  
1913, the above named plaintiff commenced this  
action in this Court to recover the sum of  
Thirty-five Thousand (\$35,000.00) Dollars,  
damages alleged to have been sustained by the  
widow and children of William L. Turner, de-  
ceased, by reason of the death of said William  
L. Turner while crossing the yards and station  
grounds of this defendant at the City of Enid,  
Oklahoma.

Second: Your petitioner further avers  
that the time has not elapsed within which the  
defendant is required by the laws of the State  
of Oklahoma, or by the rules of the said District  
Court of Garfield County, in the State of Okla-  
homa, to answer or plead to the petition of the  
plaintiff herein.

Third: Your petitioner avers that the  
plaintiff, A. P. Bond, Administrator of the es-  
tate of William L. Turner, deceased, was at the  
time of the commencement of this suit, ever  
since has been and still is, a citizen of the State



of Oklahoma, and residing in Garfield County, within the Western District of the State of Oklahoma; that the Chicago, Rock Island and Pacific Railway Company, the defendant herein, was at the time of the institution of this suit, ever since has been and now is a corporation organized under and by virtue of the laws of the States of Illinois and Iowa, with its principal place of business at the City of Chicago, in said State of Illinois, and was at the time of the commencement of this suit, ever since has been and still is a non-resident and non-citizen of the State of Oklahoma.

Fourth: Your petitioner shows to this Honorable Court that this is a suit of a civil nature and that the amount in controversy in this cause exceeds the sum of Three Thousand (\$3,000.00) Dollars exclusive of interest and costs, and that the controversy herein is between citizens of different states.

Fifth: Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, conditioned that it will, within thirty days from the filing of this petition, enter in the District Court of the United States for the Western District of the State of Oklahoma a certified copy of the record in this suit and for the payment of all costs that may be awarded against it by the said United States District Court if said United States District Court shall hold that said suit was wrongfully or improperly removed thereto.

Sixth: Your petitioner further states that notice of the filing of this petition and of the bond herein, has been duly served upon the opposing party as required by law.

Seventh: Your petitioner further avers that the said William L. Turner, deceased, for

whose death this suit is brought, was not at the time of sustaining the injuries from which he died an employe of petitioner engaged in commerce between the states, or engaged in interstate commerce.

Eighth: Your petitioner further prays that this Court proceed no further herein except to make the order for removal as required by law and to accept the bond presented herewith and direct a certified copy of the record of this suit to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY.

By C. O. BLAKE,

H. B. LOW,

W. H. MOORE,

J. E. GAMBLE,

AND

ROBERTS & CURRAN,

Attorneys for Petitioner.

STATE OF OKLAHOMA,  
County of Garfield.

I, J. G. Gamble, of lawful age, being first duly sworn, upon my oath depose and say: That I am an agent and attorney of the above named defendant, The Chicago, Rock Island and Pacific Railway Company, and as such authorized to make this affidavit for and on behalf of said petitioner; that said defendant, The Chicago, Rock Island and Pacific Railway Company is a foreign corporation and not a resident of the State of Oklahoma. and that there is no managing officer of said defendant in Garfield County in said State: that I have read the above and foregoing petition for removal and the facts

stated therein are true as I verily believe; further affiant sayeth not.

J. G. GAMBLE.

Subscribed and sworn to before me this  
24th day of June, 1913.

GEO. M. SCIFRES,  
Clerk District Court.

My Commission expires-----

Endorsed.

No. 1452.

In the District Court of Garfield County, Oklahoma.

A. P. Bond, Admr. Plaintiff.

vs.

The C. R. I. & P. Ry. Co., Defendant.

Petition for removal and notice.

Filed June 24, 1913. Geo. M. Scifers, Clerk  
District Court.  
"Chg."

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There was an order of remand on the 18th day of September, 1913, which was filed in the said State Court October 11, 1913. Thereafter Defendant in Error filed his amended petition October 24, 1913, which is as follows:

IN THE DISTRICT COURT OF GARFIELD  
COUNTY, OKLAHOMA.

A. P. Bond, Administra-  
tor of the Estate of  
William L. Turner, De-  
ceased, Plaintiff

v.

Action for Damages

Chicago, Rock Island and  
Pacific Railway Com-  
pany, a corporation,  
Plaintiff.

## PLAINTIFF'S FIRST AMENDED PETITION

The plaintiff, by leave of court first had files this his first amended petition, and for cause of action states:

1.—That William L. Turner departed this life on the 28 day of July, 1912, at Enid, Garfield County, Oklahoma, leaving as all and his only heirs, and persons dependent upon him for support, and to whose support he contributed, his widow, Ida M. Turner, aged forty years, residing at Enid, Oklahoma, Nellie Munger, his daughter, aged twenty-two years, residing at Creston in the State of Iowa, Annie Foley, his daughter, aged twenty years, residing at Enid, Oklahoma, and the following, residing with their mother, the widow above named at Enid, Oklahoma, to-wit:—Vera Turner, his daughter, aged fifteen years, Mary Turner his daughter, aged ten years, Dorathea, his daughter, aged eight years. William L., his son, aged six years, Bessie, his daughter, aged four years, and Austin L., his son, aged one year.

2.—That thereafter to-wit, on the Fourth day of June, 1913, this plaintiff was, by the County Court of Garfield County, Oklahoma, duly and legally appointed Administrator of the estate of the said William L. Turner, deceased, the said court then and there having full power and authority to make said appointment, and thereupon, and before filing this action he duly and legally qualified as such, and entered upon his duties as such administrator. and as such, he brings this action for the benefit of said widow and children.

3.—That the Chicago, Rock Island and Pacific Railway Company, defendant, is now, was on the 28 day of July, 1913, and for several

years prior thereto, continuously until the present time has been, a common carrier by railroad, engaged in interstate commerce between the states of Kansas, Oklahoma, Texas and other States of the American Union, during all which time it has owned, and now owns, operated, and now operates, a line of railway, between the said states, which line passes through Garfield County, Oklahoma, and through the incorporated limits of the City of Enid. in said County as do all other tracks of said road hereinafter described. The said tracks being: The house track, which runs by the side of the freight house on its east side, and next this, is the main track, then the passing track, then next track number one, and next track number two, and next, track number three, and next, track number four, and next, track number five, and next, track number six, and last, the dead track, which connects only at the south end with the line of road. All these tracks are parallel, and run nearly from the north to the south, but bear a little to the west as they proceed to the south. At the south end, near their termination, are located coal chutes, into the pockets of which, coal is shoveled from cars set on the chutes, for use of all engines, local and interstate.

4.—That the said City of Enid, is a city of the first class under the definitions of the statutes of the State of Oklahoma, and has adopted a charter under and by virtue of power granted to it by the constitution and laws of the State of Oklahoma, among which powers is that to regulate the speed of all trains within the limits of said city, whether on its main line or on the switch tracks within the limits of said city, and that in pursuance of such power it has

fixed the speed of such trains at ten miles an hour, beyond which it is unlawful to proceed.

5.—That said William L. Turner, deceased, on the 28th day of July, 1912, that being the day of his being killed as hereinafter stated, was in the employ of the said railway company under two distinct labor contracts, one for unloading coal into the said coal pockets from cars on the chutes, to gather up drippings from the chutes and load them on cars or engines as the company might direct, to unload sand for the company at such places as the company might direct, to unload sand for the company at such places as the company might require, to unload cord wood for the company in such piles on the right of way at Enid as the company might direct, to load cinders on the cars for the company, to gather up coal tickets which engine-men and others in charge of engines were required to deposit in boxes at the said chutes when taking coal, and daily turn them into the freight house office of the company, to report daily all the coal unloaded by him, and to order coal set into the chutes for unloading. This contract is marked Exhibit "A" and attache' to the original petition herein, and hereto referred to and made a part of this petition. The other of said contracts was for cooping cars to hold grain for transportation by said company out of the State of Oklahoma. In all of these duties he was subject to the orders and directions of the company. Other duties imposed upon him and which he performed, was transferring freight, both interstate and local, from cars to cars for further transportation. That he was actively engaged in these duties when killed by the negligence of the defendant company as hereinafter set out. His duties were of such a

character that he was called to all parts of the yards and tracks above mentioned. Incident to the duties thus required, and in order to have the coal cars of the company unloaded, he conferred with industrial concerns at the sides of the switch tracks about having cars set in for unloading, and in order to unload same.

6.—That on the 28th day of July, 1912, just before the hour of five o'clock in the afternoon, he had taken the coal tickets from the boxes, at which time the whole southern limit of the switch yards were clear of any cars or engines. The day was Sunday, and on that day no switching was done in the yards, there being but one switch engine and switch crew at Enid, whose duties were those of switching, and this engine and crew were that day not at work. There was that afternoon a strong and boisterous wind blowing from the south, but a little more westerly than the trend of the tracks, thus crossing the tracks as it passed north, in a long sharp angle. This wind was of such character that smoke from engines was blown down and around objects near the ground, so that they were hidden in it.

7.—After taking his coal tickets from the boxes, he went to the Enid Mill and Elevator Company, and was there conversing, when a train whistled from the south for the station. Taking out his watch, he said, "That is twenty-four," that train being a large finely equipped passenger train, and he further said, "I must turn in my coal tickets and order coal set on the chutes," and immediately started toward the freight house where was the office in which he must go to deliver his coal tickets and order coal for the chutes.

8.—The train, twenty-four, an interstate



passenger train, was thundering in, passing the chutes with great noise and confusion, with its bell, its whistle, its putting on air, clanging of cars, and making much steam and smoke. The strong wind carried the steam and smoke near the ground, and hid all objects which it engulfed. That among such objects thus hidden, was road engine number 2113, just in from Kansas with an interstate train, from a portion of which it had been uncoupled, at the north end of the switches, taking with it its tender, one or two flat cars and two or more box cars, making in interstate commerce count not less than five cars, and perhaps, six. After uncoupling it proceeded with its cars south along the main track to the chutes above mentioned, without being observed by said Turner, and had just entered upon track two at the chutes, out of the way of twenty-four, just coming in from the south. At this moment Turner was rounding the last car in the line which prevented him going directly across the tracks from the mill to the freight house, and in doing so had to go further south than the entrance to the freight house. He crossed tracks until he came to track two, and between this and track three he walked for a distance further north in order to cross more directly toward the freight house. All this time twenty-four was coming toward him, and knowing no cars or engine were south of him, and the switch crew being not at work, his attention was mainly directed to twenty-four. But engine 2113 with all its five cars, all coupled up and in perfect order with the said engine, moving north on track two, near to and parallel with the track on which twenty-four was coming in, being the main track, had not attracted his attention, being in the smoke and



invisible, and not making noise because not using its power train brakes, or giving signals nor making warnings of any kind, but running at greater speed than allowed by the ordinances of said city, and in violation of a statute of the United States hereinafter more particularly set out. Turner continued to walk in the space between track two and track three until he should arrive at the proper point to cross over that track toward the freight house. His back was thus toward the advancing train on track two. He did not observe its approach, but was seen by the fireman from the engine, and by a brakeman on the north end of the advancing flat car which was the furthest north of all the cars of that train. He stepped upon the track to cross it, and had proceeded so far, that he had set his foot down outside the west rail, about a foot from it, and the train was rapidly approaching him, with no signals of warning, and running in violation of statute as herein explained, by which it was not controlled in its speed, and the brakeman gave a keen yell which caused Turner to turn to the right to ascertain its cause, without, however, moving his feet, and his body being thus thrown in a strain, he could not recover himself and was struck by the train, which would likely not have happened but for said train being run without the use of its train power brakes, and so the running of said train in violation of said statute contributed to cause his death. That in turning as above stated, the left foot remained over the west rail, and was there cut off and lay outside that rail. His body was thrown down on its face, and the top of his head crushed off down to the ears and eyes, on the east rail, while he at the time of being arrested in his walk was moving toward the

northwest. That the yell of the brakeman in arresting his progress, and the unlawful running of said train contributed to the killing of said Turner as above set out.

9.—That in pushing said cars by said engine No. 2113, as stated, and by which the said William L. Turner was killed, the said engine and cars, and as a train, were operated and used by the engineman and train crew in violation of a statute of the United States, to-wit: Section 2 of an act to amend an act entitled, An Act to protect the safety of employes and travelers upon railroads by common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes, approved March second, eighteen hundred and ninety-three, and amended April first eighteen hundred and ninety-six, in that the continuous train power brakes with which said engine and cars were equipped were not used and operated by the engineer or other person in charge of said engine, 2113, while backing on track two as heretofore stated, nor at any time before the said train, had reached said Turner nor thereafter, until the whole of said train had passed entirely over his body and as much as three car lengths farther, and that the speed of said engine and cars was not placed under control and power of said continuous power brakes, but was proceeding under the force of the engine, pushing, and such train power brakes were not then and there used and operated to control the speed, nor for stopping, nor for other purposes. That said act was in further violation of said statute in this, that it was in violation of a rule of the Interstate Commerce Commission of the

United States, made on the 6th day of June, 1910, made under and by virtue of the requirement of the said section above named, directing said order to be made; that for the reasons above stated the said train was not controlled in its speed, and this caused said train to strike, kill and pass over the body of the said William L. Turner.

10.—Having thus given a detail of the acts leading up to the killing, and the killing itself, plaintiff now says: That the deceased, William L. Turner, was killed by the defendant's negligence, carelessness, wrongfulness, and unlawfulness, and the incompetency of its servants, agents and employes, while it was engaged as a common carrier by railroad in interstate commerce between the states, and while the said William L. Turner was an employe of defendant, and engaged at the time he was killed in doing an act of interstate commerce for the defendant, and that the several of such negligences are as follows:

(a)—By starting the said engine, 2113, and its train backing on track two, while train number twenty-four was coming in on the main track and very near to it, with the two tracks running nearly parallel.

(b)—By starting and running in such proximity amid the smoke and steam which obscured it.

(c)—By failing to give the blasts from the whistle which the rules require before commencing to back.

(d)—By neglecting, under the circumstances to ring the bell and sound the whistle frequently while backing.

(e)—By continuing to back before twenty-four came to a stop.

(f)—By commencing to back at a time, and continuing so to do that its signals, if given, were likely to be commingled with those of twenty-four, and to be incapable of being understood, thus causing confusion in the interpretation and endangering those who might be near.

(g)—By the fact that its signals, if sounded, would be intermingled with those of twenty-four, and be misunderstood.

(h)—By failing to signal Turner, when seen walking between tracks two and three, to notify him of their presence and approach.

(i)—When seeing him about to enter on track two, by failing to signal him in some effective manner that he might become aware of their approach before entering in a position of danger.

(j)—By the fireman in the cab with the engine not having the engine slowed or stopped when he saw Turner entering on track two, until he should see that he had safely passed in the clear.

(k)—By the brakeman in the flat car when he saw Turner entering on track two failing to signal the engineer to stop or go slow until he could see that Turner was in the clear.

(l)—By the brakeman not having in his hand any flag or other device for signalling the engineer or the fireman such as the rules of the company require brakemen to have when performing that class of duties at all times.

(m)—By the brakeman being out of sight of the engineer and keeping out of his sight so that no signals could be seen if made.

(n)—By the brakeman in waiting to give signal to Turner until he was in imminent peril, and then, instead of giving a train signal, which

Turner well understood, he gave a loud and piercing yell, which caused Turner, who was unaware of any danger, to stop and turn, and throw him in a position to be helpless with the rapidly running train.

(o)—The engineer was guilty of negligence in running his train at high rate of speed and in not using the train power brakes by which he might have controlled its speed or have stopped it when signalled so to do. He was guilty of negligence in running his train in excess of the speed established by ordinance of the city.

(p)—He was guilty of most culpable negligence in running his train in violation of the statute of the United States as heretofore detailed.

(q)—That he was guilty of negligence in so running his train at such speed in the switch yards, in the city limits and at the same time not ringing his bell and sounding the whistle.

(r)—That he was at fault and negligent, when he found his brakeman was not in sight, that he did not stop his train and go to the brakeman and require him to keep in sight, that his signals could be seen.

(s)—That said train crew had abundant opportunity to have saved the life of Turner, but did not undertake to do so until all chance was gone, and it was too late.

That from all the circumstances above set out the defendant was wholly and solely the cause of said Turner being killed, as stated, and that he, the said Turner was entirely free from any negligence in the circumstances. And plaintiff therefore says, that the defendant, while engaged in interstate commerce as a common carrier by railroad, by the careless, negligent, wrongful and unlawful acts of its agents,

servants and employes as above set out and detailed was guilty of negligence, carelessness, wrongful and unlawful running of said engine number 2113 in backing in said track two and pushing said cars and engine over and killing him, the said William L. Turner, when he was at the time engaged in performing an act of interstate commerce for the defendant, as its employe, in said track two of said yards, in the City of Enid, Garfield County, Oklahoma, at the time stated, and not through any contributory fault or negligence on his part.

11.—That the deceased, William L. Turner, at the time of his death was of the age of forty-six years, and that he had an expectation of life for over twenty-four years, that he was a sound, vigorous, healthy, industrious, capable and trained man in his occupation, and had the confidence, trust and esteem of the officials because of his accuracy, his diligence, his integrity, his attention to duty, his fidelity in obeying instructions, his intelligence and care of the property entrusted to his care his caution in avoiding injury to others and himself, his long service with the company of twelve years in important stations necessary to carry on the business of an interstate railway, all of which are witnessed by the fact that he had thus served them for twelve years, constantly, and when killed was serving under a contract which was self renewable and continued to subsist until notice by either should terminate such contract. That during said twelve years of service he had by his diligence, management and labor, earned Fifteen Hundred dollars annually, and he was earning at that rate when killed. That he annually expended upon his family the whole of said sum, so that his contribution to their sup-

port was, at his death the sum of Fifteen Hundred dollars, each year, of which they are deprived by reason of his death.

That, therefore, for the negligent, wrongful and unlawful killing of the said William L. Turner, at the place, at the time, and in the manner and form herein stated, the said defendant has damaged the said widow and children in the sum of Thirty-five Thousand Dollars, his prospective earnings for his expectation of life, for which plaintiff asks judgment, that same may be distributed to the parties entitled thereto as their interests appear by law, and that defendant pay the costs of this action.

JOHN C. MOORE,  
Attorney for Plaintiff.

Endorsed.

No. 1452.

Bond, Admr,

v.

C. R. I. & P. Ry Co.

First Amended Petition.

Filed October 24, 1913. Geo. M. Scifres,  
Clerk District Court.  
Chg.

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Thereafter the Plaintiff in Error filed its answer, November 14, 1913, which is as follows:  
IN THE DISTRICT COURT OF GARFIELD  
COUNTY, STATE OF OKLAHOMA.

A. P. Bond, Administrator of the  
Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

No. 1452.

The Chicago, Rock Island and  
Pacific Railway Company, a  
Corporation, Defendant.



## ANSWER TO PLAINTIFF'S AMENDED PETITION.

Comes now the above named defendant, The Chicago, Rock Island and Pacific Railway Company, by its attorneys, the undersigned, and for its answer to the amended petition of the plaintiff filed herein, denies each, all and singular the allegations therein contained, except such as are hereinafter expressly admitted to be true, and expressly admits that it is a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, having its principal place of business is at the City of Chicago, in said State of Illinois, and having and operating a line of railway into and through the State of Oklahoma and into and through the County of Garfield therein.

2. Further answering and for a separate defense, said defendant, The Chicago, Rock Island and Pacific Railway Company, avers that if the said William L. Turner received the injuries from which he died as alleged, in plaintiff's petition herein, and on account of which this suit is brought, which is not admitted but expressly denied, that the said injuries and death of the said William L. Turner were directly due to and proximately caused by the negligence and want of care on the part of the said William L. Turner, and that the said injuries to and death of the said William L. Turner were not contributed to or caused by the negligence or want of care on the part of this defendadt.

3. Further answering and for a separate defense, said defendant, The Chicago, Rock Island and Pacific Railway Company avers that if the said William L. Turner received the in-



juries from which he died as alleged in plaintiff's petition and on account of which this suit is brought, that the said William L. Turner was guilty of negligence and want of care directly and proximately contributing to his said alleged injuries and death in this, to-wit: That on the afternoon of July 28th, 1912, at about the hour of five o'clock, the said William L. Turner was walking between the tracks known as numbers two and three in the yards of the defendant at the City of Enid, Oklahoma, and was at such time in a place of safety; that the said William L. Turner while so walking between the said tracks and being in a place of safety, did fail to exercise ordinary care for his own safety before leaving his said place of safety and did step upon the said track number two, in defendant's said yards at the City of Enid, immediately in front of an approaching train, by which he was struck and knocked down, sustaining the injuries which resulted in his death; that the said inattention, negligence and want of care on the part of the said William L. Turner directly and proximately contributed to his injuries and death.

Wherefore, having fully answered, said defendant, The Chicago, Rock Island and Pacific Railway Company, prays to be hence dismissed with all its costs and expenses in this behalf laid out and expended.

ROBERTS & CURRAN,  
C. O. BLAKE,  
R. J. ROBERTS,  
W. H. MOORE,  
AND t  
J. G. GAMBLE,  
Attorneys for Defendant.

Endorsed.

No. 1452.

In the District Court of Garfield County, Oklahoma.

A. P. Bond, Administrator, Plaintiff,

vs.

The C. R. I. & P. Ry. Co. Defendant.

Answer to Plaintiff's Amended Petition.

Filed November 14, 1913. Geo. M. Scifres,  
Clerk District Court.  
Chg.

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On November 15, 1913, Defendant in Error  
filed his reply, which is as follows:

IN THE DISTRICT COURT OF GARFIELD  
COUNTY, STATE OF OKLAHOMA.

A. P. Bond, Administrator of the  
Estate of William L. Turner,  
Deceased, Plaintiff,

vs.

No. 1452.

The Chicago, Rock Island and  
Pacific Railway Company, a  
Corporation, Defendant.

Plaintiff, for reply to defendant's answer,  
says: That he denies each and every allegation  
of negligence set up in defendant's answer, re-  
garding the actions of the deceased, William L.  
Turner, and every other allegation therein al-  
leged as defense to this action, and prays as  
heretofore prayed for relief.

JOHN C. MOORE,  
Attorney for Plaintiff.

Endorsed.

No. 1452.

Bond, Admr.

v.

C. R. I. & P. Co.  
Reply.

Filed November 15, 1913. Geo. M. Scifres,  
Clerk District Court.  
Chg.

### TESTIMONY.

W. B. PENNIMAN, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of plaintiff, testified as follows, viz:

#### DIRECT EXAMINATION.

By Col. Jno. C. Moore:

Q. State your name?

By the witness:

A. W. B. Penniman.

Q. Where do you live?

A. 902 West Cherokee.

By W. H. Moore:

The defendant objects to the introduction of any evidence in this case for the reason that the allegations of the petition are not sufficient to entitle the plaintiff to a verdict against the defendant.

By the Court:

Objection overruled.

By W. H. Moore:

Defendant excepts.

By Col. Jno. C. Moore:

Q. What is your occupation?

By the witness:

A. I am a funeral director and embalmer.

Q. I will ask you if as such as you were called to take charge of the body of William L. Turner on the 28th day of July, 1912?

A. Yes, sir.

Q. Where did you find the body?

A. I found it in the yards of the Rock

Island Railway Company near the depot in the City of Enid.

Q. Can you remember about what track it was on if it was upon a track?

A. Yes, sir, I believe I could go to the place; it would be difficult to describe the location, however.

Q. Do you know what is called the house track?

A. Yes, sir.

Q. Do you know what is called the main track?

A. Yes, sir.

Q. And do you know what is called the passing track?

A. Well, I don't know that I do, possibly so; I think that would possibly be the next track.

Q. Then do you know where track No. 1 was?

A. Well, I don't know that I would be safe in testifying to that; I presume it would be the next track further on.

Q. And the track No. 2 further on?

A. And so on numerically.

Q. In reference to the tracks I have mentioned, where would you say the body was, on which track?

A. I will say the body was between the rails of track one or two.

Q. What position was the body lying in?

A. Do you mean with reference to the tracks?

Q. No, sir, with reference to the how it lay, which side?

A. The body lay on its face.

Q. Where did the head lie?

A. The head was east.

Q. How far to the east?

A. Just inside the east rail.

By W. H. Moore:

The defendant will object to this testimony until it is shown that this was the condition of the body immediately after the accident.

By Col. Jno. C. Moore:

I think I will connect this up.

By Col. Jno. C. Moore:

Q. Do you know how long after he had been killed that you were there, Mr. Penniman?

By the witness:

A. No, not exactly, but not long; just a little while.

Q. There was others there?

A. Yes, sir.

Q. Did you notice Mr. Smith, who was acting Coroner, there?

A. Mr. Smith came after I did.

Q. You were not immediately the first to the body, were you?

A. No, sir, there were others there.

Q. Did the body have the appearance of having been touched or moved by anybody?

A. No, sir.

Q. It seemed to have been in the position in which it fell?

A. Yes, sir.

By W. H. Moore:

We object; that is calling for a conclusion.

By the Court:

I don't think this is very material. The position of it is incompetent unless it is shown that is the position immediately after the car or train passed over. Proceed. This testimony

will be admitted now and will be ruled out if it is not shown that the condition in which he found it was the condition that it was left in after the train passed over it.

By Jno. C. Moore:

Q. Now, Mr. Penniman, describe the condition of the body?

By the witness:

A. Well, the body lay east and west; I would say that any casual observer would say that the body lay east and west with the head to the east.

Q. What was the condition of the head?

A. The head had been mashed from the top of the forehead across one ear; the cranium was gone.

Q. That is what produced death is it?

A. I would assume so; yes, sir.

Q. Did you notice about any other part of the body?

A. His foot had been amputated?

Q. Where was it?

A. The amputated foot was outside of the other rail on the west.

Q. Where was his right foot as near as you can remember?

A. Well, the right foot had been uninjured and was on the inside of the west rail.

Q. Did you finally take up the body from where it was?

A. Yes.

Q. I will ask you if before you did that or while doing so whether there was any smear of blood upon the rail?

A. I think there were some evidences of blood, an ear and some particles of skull gone and scattered there.

Q. State about how far outside the west rail lay the foot?

A. Well, just right close up near where it was cut off.

Q. How was the body dressed?

A. Dressed in ordinary work clothes.

Q. Can you state what kind of garments he had on?

A. He was dressed with blue over-alls, with a common work shirt, such as workmen usually wear.

Q. What was his condition as to being sweaty or dry and clean?

A. Well, he had been at work; his clothes were still drity and wet with sweat.

Q. Did you take up the body?

A. Yes, sir.

Q. Did you dress it?

A. I took the body to my parlors and washed and embalmed him.

Q. I will ask you if you saw any marks or bruises upon the body in addition to what you have detailed?

A. Yes, sir, there were several abbraisions and contusions on the elbows and arms.

Q. Did you observe any on the right side?

A. Yes, sir, there das an abbraision on the right side.

Q. Explain that?

A. There was a contusion on the side along about the floating ribs, a little back of the meridian line.

Q. What was its appearance as to discoloration?

A. Well, there was some discoloration.

Q. How long have you been engaged in your present occupation?

A. About fifteen years.

Q. There is literature that belongs to it as literature is there not?

A. Yes.

Q. And you are familiar with that literature?

A. Fairly so I think.

Q. And you are familiar with handling bodies that have met death by violence?

A. I have handled a great many, yes, sir.

Q. Could you tell from the appearance of the bruise that you speak about on the right side whether it was made before or after the pulse had ceased to beat?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

Over-ruled.

By W. H. Moore: "Eception."

By the witness:

A. Yes, sir.

By Jno. C. Moore:

Q. Now, you may state from your knowledge of the books and from your experience whether that bruise was made before or after the blood ceased to pulse?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

How do you claim that to be material Colonel?

By Col. Jno. C. Moore:

If that bruise had been struck a long time before death it would be very black—

By the Court:



But how is it material whether it was struck before or afterwards?

By Col. Jno. C. Moore:

It is one of the most material things almost in our testimony. If he turned that way in response to that call of the brakeman and it was done by the car striking him, it shows that he did turn that way. I don't like to expose my theories at this time, but it would show his position—

By W. H. Moore:

I will withdraw my objection and let the question be answered.

(Here, at the request of counsel, the last question above was by the Reporter read to the witness, viz: "Now, you may state from your knowledge of books and from your experience whether that bruise was made before or after the blood ceased to pulse?"

By the witness:

A. It was made before.

By Col. Jno. C. Moore:

Q. Can you tell from it whether it was any considerable period before?

A. It was a very short time.

Q. Mr. Penniman, did you find any other object there except his foot any object that he had about his person?

A. Yes, sir, I picked up some other things.

Q. What were they?

A. A hat, pipe, and his watch was taken out of his pocket.

Q. What did you do with the pipe?

A. I think I gave that to some member of the family, possibly Mrs. Turner.

Q. I will ask you what was the condition of the stem of it, if you can remember?

A. The stem was broken right close to the mouth piece.

Q. And in that condition you gave it to Mrs. Turner?

A. Yes, sir.

Q. Did you have the remainder of the stem?

A. No, sir.

Q. At the time you were at the body how far from it were the cars standing on the same track?

A. I don't know; not far.

Q. Which way?

A. Well, there was cars both ways I think.

Q. On the same track?

A. I believe so.

Q. What did you see to the north of you?

A. There was an engine and a flat car, I think, on the north side, and it looked like the train had been cut in two, but I am not positive about that.

Q. How far away from the body was the engine?

A. I should think it was further than from here to the windows yonder (Indicating from north to south end of court room, being about 60 feet to 75 feet) may be it was twice that distance. (Being about 130 or 140 feet.)

Q. Was it standing next to the body or was there some other car between?

A. I don't know.

Q. You cannot remember?

A. No, I didn't pay much attention to that part of it.

Q. I will ask you if you remember about the wind that day, the state of the weather?

A. Well, it was hot and blustery, and windy.

By Jno. C. Moore: "That is all."

CROSS EXAMINATION.

By W. H. Moore:

Q. What time of day was it that you went down there?

By the witness:

A. I believe it was about six o'clock.

Q. It was broad day-light yet?

A. Yes, sir.

Q. You went there for the purpose of taking care of the body?

A. Yes, sir.

Q. Did you make any special inspection to see where the cars were, what the situation was there?

A. No, that was an immaterial part of my errand.

Q. And the statement you make now about the distance of that car or whether the engine or the flat car was next to the body is simply an impression you had over a year ago?

A. Yes, sir.

Q. You would not undertake to say positively about those things? Whether the engine the tender or a flat car was next to the body?

A. No, sir, I would not undertake to testify positively about that.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

E. F. SMITH, a witness, of lawful age being first duly sworn by the Clerk of the Courts, and being called as a witness upon the

part of the Plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Col. Jno. C. Moore:

Q. State your name?

By the witness:

A. E. F. Smith.

Q. Where do you live?

A. Enid.

Q. What is your occupation?

A. Attorney at law.

Q. And a Justice of the Peace?

A. Yes, sir.

Q. I will ask you if you were called as Coroner on the 28th of July, 1912, in regard to the body of William L. Turner, deceased?

A. Yes, sir.

Q. Where did you go?

A. I went down to the Rock Island switch yards.

Q. Can you remember what track it was?

A. I think it was four or five tracks over from the freight office, probably about the third switch track.

Q. Had anybody been there before you?

A. Yes, there was quite a crowd gathered there before I got there.

Q. In what position was the body lying?

A. Between the rails on one of the switch tracks. I think the fourth or fifth track from the freight house, almost due east of the north end of the freight house, as near as I can recollect.

Q. Which way was the head?

A. The head was pointing to the east.

Q. And the feet?

A. To the west.

Q. What was the condition of the head?

A. The head was mutilated, the top was taken off.

Q. By which rail?

A. The east rail.

Q. Where were his feet?

A. One foot was drawn up a little inside of the rail; the other one was on the outside severed from the body.

Q. Can you remember which foot was severed?

A. No, I cannot. I think it was the left foot; I will not be positive though.

Q. Did you make any particular examination of the body?

A. Oh, just in a general way; I didn't make any particular examination of the body or clothing.

Q. What was the condition of the clothing?

A. A little bit disarranged, like they ordinarily would be.

Q. On which side did the body lie?

A. The body lay face downward.

Q. I will ask you if you noticed what kind of garments he was wearing?

A. He had on what I would call—I don't think they were over-alls, they were just every day clothes and an every day work shirt, if I remember right.

Q. Did you see any other objects lying there besides his foot that he had possibly about his person?

A. I don't recall any now; oh, you mean besides his foot?

Q. Yes, any objects lying there that he might have had about his person?

A. Nothing only parts of the body that I can recollect now.

Q. I will ask you if you made an investigation as Coroner into the cause of his death?

A. No, not as Coroner; that is, I didn't hold what you call an inquest; but I was there as Coroner, yes, sir.

Q. You had some witnesses sworn did you not?

A. I did for the purpose of testifying to find out whether it was necessary or advisable to hold an inquest over the body.

Q. Can you remember how many witnesses you had sworn?

A. Four or five.

By W. H. Moore:

The defendant objects to going into this

By the Court:

Sustained.

By Jno. C. Moore:

That is all. You may take the witness.

#### CROSS EXAMINATION.

By W. H. Moore:

You may stand aside.

W. M. HUTCHINSON, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the Plaintiff, testified as follows to-wit:

#### DIRECT EXAMINATION.

By Col. Jno. C. Moore:

Q. State your name?

By the witness:

A. W. M. Hutchinson.

Q. Where do you live?

A. I live in the country here now.

Q. Were you acquainted with William L Turner during his lifetime?

A. Yes, sir.

Q. How long had you known him?

A. About eight years.

Q. Did you see him on the 28th day of July, 1912, the date of his death?

A. Yes, sir.

Q. About how long before he died?

A. About ten minutes.

Q. What were you doing at the time?

A. I was firing at the white mill at that time.

Q. At what particular place were you when you saw him first?

A. I was on the cinder pile when I was talking to him.

Q. At about what hour of the day?

A. It was about 5:25 o'clock.

Q. In the morning or evening?

A. In the evening.

Q. What were you doing on the cinder pile?

A. I was hauling cinders from the boiler room.

Q. Where was he?

A. He was coming from the ice plant when I first discovered him.

Q. From which part of the ice plant?

A. When I saw him he was about twenty feet south of the door coming towards me.

Q. Called the cream room?

A. Yes, sir.

Q. What did he say to you when he came up, if anything?

By W. H. Moore:

The defendant objects as incompetent, irrelevant and immaterial.

By the Court:

How do you claim that to be material.

Colonel?

By Jno. C. Moore:

It is part of the *res jaeste*.

By the Court:

I think that is stretching the *res jaeste* a little.

By Jno. C. Moore:

It was the view of Judge Cottrell that it was *res jaeste* when we had the matter before him on removal.

By the Court:

But you were not trying the merits of the case in the United States Court.

By Jno. C. Moore:

Well, it involved *res jaeste*.

By the Court:

I will sustain the objection now; and if you have an authority on that I will be glad to hear it; I do not understand that *res jecte* ordinarily takes place that far ahead; *res jecte* as I understand it, is what was said and done at the time and immediately prior to the occurrence.

By Jno. C. Moore:

Or connected with the occurrence.

By the Court: "Objection sustained at this time."

By Jno. C. Moore: "Exception."

By Jno. C. Moore:

Q. What did he do while you were conversing there, while you were on top of the cinder pile?

By the witness:



A. He walked up and spoke to me. He lit his pipe, and about that time he heard a train whistle and he pulled out his watch and says,—

By W. H. Moore:

Never mind what he said.

By the Court:

Just state what he did, not what he said

By the witness:

A. Well, he lit his pipe and turned and walked away.

By the Court:

Q. When he pulled his watch out what did he do?

A. He said—

Q. What did he do; did he look at it?

A. Yes, sir.

Q. Then what did he do?

A. He put his watch in his pocket.

Q. Then what did he do?

A. He turned around and walked away west.

By Jno. C. Moore:

Q. In what direction?

By the witness:

A. Between the boiler room and the elevator.

Q. I will ask you if that would be in the direction of the freight house?

A. Yes, sir.

Q. I will ask you this: I will ask you if when he pulled out his watch when 24 whistled in, when he pulled out his watch and looked at it if he said to you: "There is 24 I must go and turn in my coal tickets and order coal for the chutes?"

A. Yes, sir.

By W. H. Moore:

We wish to object to that and ask the Court to instruct counsel not to ask questions of that kind after they have been ruled out by the Court; it is highly improper and prejudicial.

By the Court:

Yes, the answer will be stricken out and the jury is instructed not to consider it.

By Col. Jno. C. Moore:

The plaintiff offers to prove by this witness that the deceased Turner, when he heard the train coming in—

By W. H. Moore:

I think this ought to be dictated to the Stenographer and not in the hearing of the jury.

By the Court:

Well, it should not be stated in the hearing of the jury.

By Col. Jno. C. Moore:

(In low tone to Reporter) I want to make this offer: Plaintiff offers to prove by this witness that when the deceased heard the train whistle he took out his watch and looked at it and said: "That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes."

By W. H. Moore:

To which offer the defendant objects.

By the Court:

The objection will be sustained.

By Jno. C. Moore:

Plaintiff excepts.

By the Court: "Exceptions allowed."

By Jno. C. Moore:

Q. Now, Mr. Hutchinson, which way did he go?

By the witness:

A. He started towards the freight depot

Q. Do you know what his business was in going towards the freight depot?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

Over-ruled.

By W. H. Moore:

Defendant excepts.

By the witness:

A. He said he was going to order coal for the chutes

By W. H. Moore:

We ask that the answer be stricken—

By the Court:

You cannot testify to what he said; don't be trying to tell that.

By Jno. C. Moore:

Q. Do you know what his business was in going towards the freight house?

By the witness:

A. I guess his business was to take his tickets to the freight house and to order coal for—

By W. H. Moore:

Q. All you know about what his business is what he told you there?

A. Yes, sir.

By W. H. Moore:

We ask that his answer be stricken from the jury as pure hear-say.

By the Court:

Sustained; the answer is stricken from your consideration.

By Jno. C. Moore:

Q. Now, Mr. Hutchinson, what kind of weather was it that day?

By the witness:

A. Well, sir, it was pretty windy.

Q. Which way was the wind?

A. From the south until about two o'clock and from that on from the south-west.

Q. I will ask you when you heard of a man being killed in the yards, if you did hear that,—did you see Mr. Turner's body in the yard?

A. Yes, sir.

Q. Where was it lying?

A. Between the tracks.

Q. What track was it?

A. I believe it was No. 5.

Q. Do you know what is called the house track?

A. Yes, sir.

Q. Do you know what is called the main track?

A. Yes, sir.

Q. Do you know what is called the passing track?

A. Yes, sir.

Q. Do you know which track No. 1 is?

A. Yes, sir.

Q. And track No. 2?

A. Yes, sir.

Q. Is track No. 2 what you call track No. 5?

By W. H. Moore:

Defendant objects—

By the Court:

Over-ruled.

By W. H. Moore:

Defendant excepts.

By the witness:

A. I will have to study a minute.

By Jno. C. Moore:

Q. Well, did you go to the body?

A. Yes, sir.

Q. Which way was the head lying?

A. His head was lying across the east rail.

Q. His feet, where were they?

A. One of them was across the west rail the one that was cut off.

Q. Did you see an engine and cars standing near him?

A. I saw an engine and three cars.

Q. Which way were they fronting?

A. The engine was fronting south and backing up.

Q. Which way from him?

A. North.

Q. How far away from him?

A. I would judge about 300 feet when I got there.

Q. How long after he left you before you heard of his death?

A. It was not over ten minutes.

Q. Was it that long?

A. Well, I could not exactly say; I don't hardly think it was exactly that long.

Q. Was that in the direction from where he had been with you towards the freight house.—between where he had been with you and the freight house.—was it between the cinder pile and the freight house?

A. No, sir.

Q. Wasn't that in the direction of the freight house?

By W. H. Moore:

We object as leading.

By the Court: "Over-ruled."

By W. H. Moore: "Defendant excepts."

By Jno. C. Moore:

Q. Which direction was it from the cinder pile to where the body lay?

By the witness:

A. Well, sir, it was south from the cinder pile, rather south and west.

Q. I will ask you in going from the white mill to where the body lay if you had to pass around or through any cars?

A. Yes, sir.

Q. State to the jury what you did do: state how you went in going to the body?

A. I went out of the boiler room door between the elevator and the coal bin and then went south and I jumped over a string of cars and went a little further and I jumped over another string and then went down a little farther and jumped over another string of cars and went down the track to where he was lying.

Q. Were you there in sight of the body?

A. Yes, sir.

Q. Did you see any object lying on the ground there that belonged to Mr. Turner?

A. I saw his hat, and I saw his pipe.

Q. Had anybody touched the body that you know of?

A. No, sir, I think not.

Q. How many persons were there by that time?

A. Well, there was about a half dozen

Q. Are you acquainted with passenger train No. 24?

A. Yes, sir, I am well acquainted with it.

Q. I will ask you if passenger train No 24 was in sight when you got to the body of Mr. Turner?

A. "24" was at the depot.

Q. You saw it then, did you?

A. I saw it there.

Q. How long had it been there in your opinion, if you know?

A. It hadn't been there over three or four minutes.

Q. You heard it coming in, did you?

A. Yes, sir.

Q. Did you hear "24" whistle?

A. I heard "24" whistle for the town yes, sir.

Q. And at the time "24" whistled William Turner was standing talking to you was he not?

A. Yes, sir.

Q. And when you got to his body, "24" had reached the station?

A. Yes, sir.

Q. Tell the jury how much work you had done after Turner left you before you heard of his death?

Rv W. H. Moore:

Defendant objects as immaterial.

Rv the Court: "Over-ruled."

Rv W. H. Moore: "Exception."

Rv the witness:

A. I walked from the cinder pile back into the boiler room and loaded up a load of cinders.

By Jno. C. Moore:

Q. That was all you had done before you heard of his death?

A. Yes, sir.

Q. How long did it take you from the time you left the boiler room until you got to the body?

A. It didn't take me over about five minutes.

By Jno. C. Moore:

That is all; you may cross-examine.

### CROSS EXAMINATION.

By W. H. Moore:

Q. What mill were you working for?

By the witness:

A. The white mill.

Q. The Enid Mill and Elevator Company?

A. Yes, sir.

Q. Their plant is about opposite the passenger depot?

A. Yes, sir.

Q. How far was it south to where Mr. Turner's body lay from the boiler room?

A. I don't really have any idea.

Q. You have a better idea than the jury, you have been over it; how far do you think it would be; what is your best judgment of the distance?

A. Well, I would judge from the mill to where Mr. Turner was laying, I would judge it was about 700 feet, may be a little further, just guessing at it.

Q. Do you recollect who told you of Mr. Turner's death, how you got the information?

A. Mr. Longworth, a car worker for the Rock Island told me.



Q. He had been down there to where Mr. Turner was?

A. I judge he had.

Q. Then you went down there?

A. I went right down there.

Q. In going down there you had to crawl over three strings of cars?

A. Yes, sir.

Q. Would you go up the side ladder?

A. I went between the cars and jumped through the bumpers.

Q. Mr. Longworth in coming to the mill had to come the same way?

A. I don't know; I never paid any attention to that.

Q. Do you know whether or not "24" stops and takes water before coming into the passenger depot, or did at that time?

By Jno. C. Moore:

We object as not proper cross-examination.

By the Court:

Over-ruled; exception allowed.

By Jno. C. Moore: "Exception."

By the witness:

A. I don't think they took water that day.

By W. H. Moore:

Q. You said you were well acquainted with "24:" was it not the practice to take water there before going to the station?

A. I have seen them take water there and not take water.

Q. Which was the practice in your experience?

A. I think they took water more times than they didn't take water.

Q. But you think they didn't take water this day?

A. I don't think they did.

Q. What makes you think that?

A. They were not taking water when I went by there.

Q. They were at the station then?

A. Yes, sir.

Q. What makes you tell the jury that you don't think they took water there that day?

A. I don't think they did.

Q. Who did you hear say that?

A. Some people down there; I never asked them their names.

By W. H. Moore:

That is all.

#### WITNESS EXCUSED.

GEORGE H. McBLAIR, a witness of lawful age, being first duly sworn, and being called as a witness upon the part of the plaintiff, testified as follows, to-wit:

#### DIRECT EXAMINATION.

By Jno. C. Moore:

Q. State your name?

By the witness:

A. George H. McBlair.

Q. Where do you live?

A. I live out in the Steel Plant addition to Enid.

Q. Did you see William L. Turner on the day he was killed?

A. Yes, sir.

Q. Where were you standing?

A. I was standing about ten or fifteen feet of the water-spout at the south end of the depot platform.

Q. Where was train "24" at that time?

A. It had just come in.

Q. Had it stopped?

A. It had hardly stopped.

Q. Where was Mr. Turner?

A. The first I noticed of him he was just starting across the track.

Q. What track?

A. Well, there is nine tracks there, and it was the center track.

Q. In the center track of the nine?

A. Yes, sir.

Q. And did you see a train coming towards him?

A. Yes, sir.

Q. When he stepped upon the track how far away was that train from him?

A. It was not over about fifty or seventy-five feet, I think, when he first started to cross.

Q. Which way was he walking?

A. Northwest.

Q. Crossing the track like?

A. Yes, sir.

Q. I will ask you how he was stepping, whether promptly or slowly?

A. He was just walking moderate like.

Q. Did he seem to notice the cars coming behind him?

A. No, sir, he was watching "24."

Q. Which direction from him was "24?"

A. North.

Q. Any west?

A. Yes, some west.

Q. But mostly north?

A. Yes, sir.

Q. Which way was this train coming on the track he was on?

A. It was backing in from the south.

Q. Did you notice any persons on that train as it was backing up?

A. One.

Q. What did he do?

A. He hallowed when they were approaching Mr. Turner.

Q. How close were they to him when he hallowed?

A. They were, I suppose, about twenty or twenty-five feet when he first hallowed.

Q. When they got closer to Turner how had Turner stepped?

A. He had stepped his left foot over the west rail, and when the brakeman hallowed he turned to the right looking eastward, the train then hit him and drewed him down.

Q. I will ask you at what rate of speed that train was running as near as you can tell?

A. I judge about twenty or twenty-five miles an hour.

Q. Coming very fast?

A. Yes, sir.

Q. I will ask you if the train had been running slowly at the time the brakeman hallowed if they would have struck him?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

Objection sustained; exception allowed.

By Jno. C. Moore:

Q. I will ask you this: As far as you could see was it caused by the brakeman hallowing—

By W. H. Moore:

Defendant objects as incompetent, irrele-

vant and immaterial, and as calling for a conclusion of the witness.

By the Court:

I am inclined to think he can detail what he saw to the jury and the jury will determine what was the cause of it.

By Jno. C. Moore:

Q. I will ask you if you saw any signals given by the brakeman to the engineer or fireman?

By the witness:

A. No, sir.

By W. H. Moore:

Defendant objects to that as incompetent, irrelevant and immaterial.

By the Court:

Over-ruled; he has answered anyway.

By W. H. Moore: Defendant excepts.

By Col. Jno. C. Moore:

Q. I will ask you if you heard any signals given by the engineer to the brakeman?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Objections over-ruled; exception allowed."

By W. H. Moore: Exception.

By the witness:

A. No, sir.

By Jno. C. Moore:

Q. Did you go to the body?

A. No, sir.

Q. How did you come to be at the depot that day?

A. I had quit the Arctic Ice plant then and had come up there to go to my home at Kremlin on train "24."

Q. Were you in plain view of this occurrence?

A. Yes, sir.

Q. Did you see Mr. Turner step his left foot out there?

A. Yes, sir.

Q. What was he in the act of doing when the brakeman yelled?

A. He was just in the act of stepping his right foot over the rail and clearing the track.

Q. Then you heard the brakeman give the yell?

A. Yes, and Mr. Turner turned to the right.

Q. And while he was in that position what happened?

A. He was hit with the train and knocked down across the track.

By Mr. Moore: "That is all."

CROSS EXAMINATION.

By W. H. Moore:

Q. This water crane that you speak of is what direction from the depot, is it south, the water-spout as you call it?

By the witness:

A. Yes, sir.

Q. How far south?

A. It is up at the end of the depot platform.

Q. Where was Mr. Turner from you?

A. Southeast like.

Q. How far from you in your judgment?

A. I don't know exactly.

Q. What is your best judgment?

A. Probably about 200 feet.

Q. That would put him about 200 feet south of the south end of the depot platform?

A. I would not be sure it was quite that much.

Q. Are you sure it was no further than that?

A. I am not sure of that either.

Q. Then is your judgment that it was about 200 feet?

A. Somewhere near that.

Q. You say you were waiting to take train "24?"

A. Yes, sir.

Q. Had "24" passed you at the time you first saw Mr. Turner?

A. Yes, sir, it had just got past.

Q. You saw him as you looked south to the rear end of "24", the rear end of "24" had passed you before you first saw Mr. Turner?

A. Yes, sir.

Q. Had "24" come to a stop before you saw Mr. Turner?

A. No, not hardly.

Q. Did "24" take water that day?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Were there any cars on the side track between you and Mr. Turner?

A. No, sir.

Q. Did you see any cars south of that at all?

A. Well there was some south of that.

Q. How far south?

A. There was some by the freight house.

Q. Was there any cars north of him?

A. I would not be sure, I think so.

Q. Your recollection is that the first cars north of him were down by the freight house?

A. Well, they extended this way some too.

Q. Now, the first thing you saw of Mr. Turner was it before or after he first got on the track that you saw him?

A. Just before he come on.

Q. Had he turned yet to go on the track?

A. No, not quite.

Q. Was there anything to attract your attention at that time when you first saw him?

A. I was watching the freight come down.

Q. But was paying no special attention to Mr. Turner at that time?

A. Not just at that time.

Q. The first you paid any attention to him was when you saw him getting in a position of danger?

A. When I saw him coming on the track.

Q. And the thing that impressed you at that time he was getting in a dangerous position where he would be struck with the train?

A. No, I thought he would make it all right; I was not thinking about him getting struck.

Q. And this train coming in between 20 and 25 miles an hour, you saw the man step on the track with his back to the train, from 50 to 75 feet from it, and you didn't think he was going to get hurt, is that your testimony?

By Jno. C. Moore: "We object."

By the Court:

I think that is arguing with the witness.

By the witness:

A. When the train was in that distance from him he was crossing the track then—

By W. H. Moore:



Q. You said awhile ago when he stepped on the east rail that the train was 50 to 75 feet away and when the brakeman hallowed at him he was about 25 feet from him.

A. Something like that.

Q. And going between 20 and 25 miles an hour?

A. Yes, sir.

Q. You didn't go over to the body you say?

A. No, sir.

Q. Did you go away on "24?"

A. Yes, sir.

Q. Where to?

A. To Kremlin.

Q. What is your business?

A. My business then was farming.

Q. That is your business now?

A. Yes, sir.

Q. Where are you working?

A. Common labor.

A. Nowhere now.

Q. Where was the last place you worked?

A. I have not done any work since I came down from Kansas this fall.

Q. When did you come down from Kansas?

A. The 20th of October.

Q. Where were you living at the time Mr. Turner was killed?

A. My home was out on the farm south of Kremlin.

Q. Do your people live there?

A. Yes, sir.

Q. Who was the first person you told about seeing this accident?

A. My folks when I got home.

Q. Who was the first one here at Enid, do you recollect?

A. I don't know that I spoke to any.

Q. Did you ever talk to Colonel Moore about it?

A. Nothing only when we were threshing at the shack; I heard him speak about him getting killed down there.

Q. Did you tell him what you had seen?

A. Not exactly.

Q. Did you tell him what you saw down there that day?

A. I told him I was there at the Rock Island depot when that occurred is about all.

Q. Have you talked with him about it since?

A. No, sir.

Q. And when he put you on the witness stand he had no idea what your evidence would be?

A. I had a talk with the lawyer, I don't know just what day it was.

Q. How long ago was it?

A. One day, I forget which day it was exactly, he asked me if I had seen that down there and I told him I had.

Q. And you told him what you had seen?

A. Well, not exactly.

By W. H. Moore: "That is all."

RE-DIRECT EXAMINATION BY JNO. C.  
MOORE.

Q. Mr. McBlair, did you see that train which ran over Mr. Turner, stop?

By the witness:

A. It didn't stop until it passed over him.

Q. How far was it from him before it stopped?

A. Well about the length of the train. One flat car and two box cars.

Q. Was there a tender on the engine?

A. Yes, sir.

Q. Did they all pass over him?

A. Yes, sir.

Q. Do you mean to say that the distance of the stop was the length of the whole of the train, the engine, cars and all?

A. It was right at it.

Q. And they ran north of the body before they stopped?

A. Yes, sir.

Q. Can you remember anything about the weather that day?

A. The wind was blowing some.

Q. Which way was the wind?

A. A little south-west, mostly south.

Q. You spoke of speaking to me at the cook shack, did you get counsel to properly understand you?

A. I didn't mean that I had spoken to you.

Q. Who did you mean you had spoken to?

A. One of my brothers and Mrs. Turner.

Q. Where did you first speak to me or I to you about this case?

By the Court:

Gentlemen, it seems to me that is immaterial. It is not only proper for a witness to talk to counsel and counsel to the witnesses, but they should do so.

By Jno. C. Moore:

That is all.

GEORGE BOND, a witness, of lawful age.

being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. You may state your name?

By the witness:

A. George W. Bond.

Q. Where do you live?

A. I live in Enid.

Q. Were you acquainted with William L. Turner in his life?

A. Yes, sir.

Q. How long had you known him?

A. I expect about fifteen or twenty years.

Q. I will ask you if you have been associated with him in labor and work?

A. About twelve years, I guess.

Q. Where, side by side and together?

A. Yes sir.

Q. Have you worked here in Enid with him?

A. Yes, sir.

Q. What kind of work were you and he doing?

A. Shovelling coal, transferring, unloading sand and loading cinders.

Q. When you say you were transferring, do you mean you were transferring freight from car to car?

A. Yes, sir.

Q. I will ask you if you knew what his general state of health was during all the time you worked with him?

A. It was fair, it was good.

Q. What was his ability to perform labor?

A. He was good at performing labor.

Q. By ability—I will ask you if he was a good laboring man?

A. Yes, sir, he could do a day's work if that is what you want to know.

Q. What was this coal used for that you and he shoveled?

A. For engine use.

Q. For trains that ran out of the state?

A. Of course; they would have to be if they went north.

Q. About this sand, what was that used for?

A. For sanding the track and putting on engines.

Q. And this transferring freight from car to car, what was the purpose of that?

A. Well, bad orders—if one was in bad order we would have to unload it and put it in another car.

Q. Where did those cars go to?

A. I don't know.

Q. They were not intended to remain in Enid?

A. No sir, I suppose not.

Q. Do you know anything about his delivering coal tickets?

A. Yes, sir, I know he always delivered the coal tickets in the evening.

Q. At what time of day did he deliver his coal tickets?

A. About five o'clock.

Q. Where did he get them?

A. Out of two boxes on the coal chute there.

Q. Then what did he do with them?

A. Took them to the freight house.

Q. And delivered them there?

A. Yes, sir.

Q. I will ask you if you know anything about his ordering coal for the chutes?

By W. H. Moore:

We object; his duty was fixed by a written contract.

By the Court:

Over-ruled.

By W. H. Moore:

Exception.

By the witness:

Q. Whenever they were out of coal he would order coal.

By Jno. C. Moore:

Q. Do you know anything about his unloading coal for the Enid Ice and Fuel Company, the Enid Mill and Elevator Company and Grubb and Purmort?

A. Yes, sir.

Q. I will ask you about that—what hours in the day did he generally unload coal for those institutions?

A. He would generally unload for the mill at night and the other places when he got time; he always kept hands there and kept plenty of coal for the chutes.

Q. Do you know how long he has been serving the railroad company?

A. No, I don't exactly.

Q. What is your best knowledge of it?

By W. H. Moore:

We object; the written contract speaks for itself.

By the Court:

Over-ruled.

By W. H. Moore: "Defendene excepts."

By the witness:

A. He had worked a good while I expect fifteen years for the Rock Island Railroad and may be more; he commenced at Caldwell, the first work I remember of.

By Jno. C. Moore.

Q. Did he turn in coal tickets every day?

A. Every day that I know of.

Q. You were with him quite continually, were you not?

A. Of course, I never paid any attention to delivering the coal tickets; he would always say, "I will go and take the tickets up," and of course, it was none of my business; I was working.

Q. He did all of that work?

A. Yes, sir.

Q. You worked for him, did you?

A. Yes, sir; I worked for him.

Q. Whose coal was it that you were handling there?

A. I suppose it was the Rock Island's.

Q. It was used by them for its engines?

A. Yes, sir.

Q. And the sand?

A. That was the same.

Q. Did you have occasion to pick up coal from the ground and put it on the engines and tenders or cars?

A. Yes, sir.

Q. And that was Rock Island coal?

A. Yes, sir.

Q. Did you ever assist in unloading cord-wood there?

A. Yes, sir, at the round house.

Q. Whose cord wood was it?

A. I suppose the Rock Island's.

Q. It was unloaded for the Company?

A. Yes, sir.

Q. In regard to the cinders in the cinder pits, do you know anything about the labor

A. We shoveled it all out.

Q. How did the cinders come to be in there?

A. They would fill the engines and knock the fires out whenever they went to put them in the round house.

Q. Didn't the engines have a cinder or ash pan below them?

A. Yes, sir.

Q. They were required to dump those ash pans in the cinder pits?

A. Yes, sir, and we would load them into the car.

Q. All this work was done for the Rock Island Railway was it not?

A. Yes, I suppose so.

By Jno. C. Moore:

That is all.

#### CROSS EXAMINATION

By W. H. Moore:

Q. Your work was being done for Mr. Turner?

By the witness:

A. Yes, sir.

Q. You were not on the Rock Island pay roll?

A. I worked for Mr. Turner.

Q. And Mr. Turner had a contract with some elevators for handling coal for them?

A. I suppose he did or he would not have handled it.

Q. You know it by seeing him do it?



A. Yes, sir.

Q. What Companies did he handle coal for besides the railroad?

A. The white mill, the ice plant and Grubb and Purmort and some for this Arctic Ice Plant.

Q. How many men did Mr. Turner have working for him?

A. Sometimes three or four and sometimes more.

Q. If the work bunched up on him he would get more men?

A. Yes, sir.

Q. And if the work was slight he would lay the men off?

A. Yes, sir, that is the way he had to do it.

By W. H. Moore:

That is all.

WITNESS EXCUSED

RECESS

By the Court:

Gentlemen of the Jury:

We will now adjourn or take a recess until tomorrow morning at nine o'clock; and in the mean time remember the admonition of the Court not to talk about the case on trial either among yourselves or with any other person, and do not remain in the presence or hearing of any person discussing the case; you will not visit the premises testified about in the case and will keep yourselves entirely free to render a verdict upon the testimony as you hear it from the witness and under the instructions of the Court, and do not form and come to any definite conclusion in the case until you

have heard all the testimony, the instructions of the Court and the arguments of the counsel. Be in your seats tomorrow morning at nine o'clock.

Thereupon, the District Court of Garfield County takes a recess until tomorrow morning, viz., November 29, 1913, at nine o'clock, a. m., by order of the Court.

FRANK H. WALLACE, a witness, of lawful age, being duly sworn by the Clerk of the Court, and being called as a witness upon the part of the plaintiff, testified as follows to-wit:

#### DIRECT EXAMINATION

By Jno. C. Moore:

Q. State your name to the jury.

By the witness:

A. Frank H. Wallace.

Q. Where do you live?

A. Enid, Oklahoma.

Q. What is your occupation?

A. Chief Clerk of the Rock Island freight office.

Q. How long have you held that position with the Rock Island road?

A. Since October, 1911.

Q. I will ask you if you knew William L. Turner?

A. I did.

Q. I will ask you if you were Chief Clerk as now, at the time he was killed?

A. Yes, sir, I was.

Q. Where were you the day he was killed?

A. I was at the local freight office.

Q. Did you see the incident of his being killed?

A. I did not.

Q. I will ask you if the incident happened in sight of the freight office?

A. Well, it was not in sight of the freight office, because there were cars between the freight office and the spot where he was killed.

Q. Can you remember how many cars were stretched along the track there?

A. I cannot.

Q. Upon what track were those cars?

A. On the house track.

Q. That is the track next to the freight house, is it?

A. Yes, sir.

Q. I will ask you if the cars on the house track extended further north than the freight house?

A. I could not say as to that.

Q. Do you remember of ascertaining what engine it was that pushed the cars that ran over Mr. Turner that day?

A. If I remember correctly, it was 2131.

Q. For the purpose of refreshing your memory, I will ask you if it was not 2113?

A. I am not positive as to that.

Q. You are not positive as to that?

A. No, sir.

Q. Who was the engineer on that engine?

A. If I remember correctly it was George Wallace.

Q. Who was the fireman on that engine?

A. Vick Reems, I believe.

Q. Have you seen him in Enid since this trial commenced, the fireman?

A. I believe I saw him this morning as I came up.

Q. I will ask you if you have seen George Wallace here?

A. Yes, sir, I saw him this morning.

Q. Was there any brakemen with that train that day?

A. Yes, sir.

Q. Who were they?

A. I don't know, but one of them, I believe, was Portelle, is the only one I know.

Q. Do you know another by the name of George Kendrick?

A. I know his face, but not by name.

Q. Have you seen him since this trial?

A. Yes, sir.

Q. Did you see Portelle this morning?

A. Yes, sir.

Q. Do you know who was the conductor of that train?

A. Bavington.

Q. Is he here?

A. I saw him this morning, yes, sir.

Q. Now, Mr. Wallace, what was the number of that train, can you tell?

A. No, sir, I cannot tell.

Q. What time of day did that train arrive in Enid?

A. I don't recollect that either.

Q. You don't remember?

A. No, sir.

Q. Which way did it come in?

A. It came from the north; what we call east.

Q. It came across the line of the State of Oklahoma?

A. I could not say as to that.

Q. Where did it start?

A. I could not say as to that.

Q. You don't know?

A. No, sir.

Q. I will ask you if you saw it come into the town?

A. Well, I don't know that I did, no.

Q. Did it bring any freight to your office?

A. I could not say as to that either.

Q. You don't remember?

A. No, sir, I had no occasion to look that up at all.

Q. I will ask you if it was engaged in getting out of the way or of doing some switching to get out of the way of 24?

A. If I remember correctly it was doing some switching; I don't know whether it was getting out of the way of 24 or whether they were picking up cars.

Q. Wasn't there a car to be picked up by it that day?

A. If I remember correctly, there was.

Q. Was it a car of chickens?

A. I don't remember.

Q. Where this killing occurred, what track was it on?

A. Well, I don't remember that, either 3 or 4, I could not say which.

Q. What is the track next to the warehouse called?

A. The house track.

Q. What is the next one called?

A. The main line.

Q. What is the next one called?

A. The passing track.

Q. What is the next one called?

A. Number one.

Q. And the next?

A. Number Two.

Q. And the next?

A. Number Three.

Q. And the next?

A. Number Four.

Q. And the next?

A. Number Five.

Q. And the next?

A. Six.

Q. And the next?

A. That is all.

Q. There are nine in all are there?

A. Yes, sir.

Q. Do you know how wide it is between two rails of a track?

A. No, sir, I do not.

Q. Do you know how wide the space is between two tracks?

A. No, sir, I could not say as to that.

Q. Who was the station agent at Enid at the time Turner was killed?

A. J. A. Bowman.

Q. Do you know where he is at this time?

A. I saw him in Enid yesterday.

Q. Saw him yesterday?

A. Yes, sir.

Q. I will ask you, Mr. Wallace, if you knew about Mr. Turner performing labor and services about the yards of the Company there?

A. Yes, sir.

Q. I will ask you what kind of work he did as well as you know it?

By W. H. Moore: "Defendant objects as incompetent, irrelevant and immaterial for the reason that his services are covered by

two written contracts pleaded in plaintiff's petition.

By the Court:

Over-ruled.

By W. H. Moore: "Exception."

By the witness:

A. He unloaded coal out of the car into the pockets of the chute and also coopered cars; that is, place the grain door and the burlap on the cars; and he also transferred freight from one car to another in case of a bad order car, and I believe that is all.

By Jno. C. Moore:

Q. Do you know anything about his shoveling coal for stationary engines?

A. Well, he unloaded coal at the round-house for that purpose, yes,

Q. Do you know anything about his unloading sand?

A. Yes, sir, he unloaded sand also.

Q. Did he unload cord-wood?

A. I know at various times he unloaded kindling; I don't know of any wood.

A. For use of the locomotives.

Q. What was the use of the coal that he shoveled into the pockets?

Q. Locomotives traveling over the line of the road?

A. Yes, sir.

Q. That would be indiscriminately for locomotives traveling locally and out of the state?

A. Yes, sir, as far as I know?

By Jno. C. Moore.

I now desire to introduce in evidence the two contracts referred to in the petition of plaintiff as exhibits "A" and "B."

HERE - CONTRACTS ARE BY THE RE  
PORTER MARKED AS EXHIBITS  
"A" AND "B."

By Jno. C. Moore:

Q. Now, I will ask you, Mr. Wallace, if in your capacity as Chief Clerk of the freight department knew when a train came in from outside of the State?

By the witness, Frank H. Wallace:

A. No sir, I do not.

Q. You knew what trains were accustomed to coming from outside the State did you not?

A. Well, not exactly, no; I had no occasion to know; a train might start at any point north of Enid and I would not know.

Q. There are trains which run regularly through your station are there not?

A. Yes, sir.

Q. Isn't No. 95 a freight train that runs regularly through your station?

A. Not regularly; it is scheduled, but there are days when this train is annulled.

Q. As a scheduled train, does it not come from the state of Kansas?

A. Yes, sir.

Q. And George Wallace is the engineer who pulls that train is he not, half of the time?

A. He might be part of the time.

Q. At this time isn't George Wallace the engineer that pulls train No. 95 every other day?

A. I could not say.

Q. Don't you know what engineers are in charge of engines?



A. No, sir.

Q. Did you have any control over the work and labor of the deceased Turner?

A. Yes, sir, I did.

Q. What kind of control did you have?

A. Well, it was my duty to see that the work was done and also to render the statements of coal unloaded by him.

Q. Was it his duty to make his report of coal unloaded to your office?

A. Nothing more than to give me the car numbers that he unloaded.

Q. That was his report?

A. That is the only report that I know that he made.

Q. That is for unloading coal into the chutes?

A. Yes, sir.

Q. You already had the number of the car as it was set up on the chutes?

A. He reported the cars to me when they were placed on the chutes.

Q. Where did he get the car that was set on the chutes before it was set on the chutes?

A. It was placed there by a switch engine.

Q. Now speaking of the switch engine what are the duties of the switch engine in the yards?

A. To do the necessary switching that is to be done.

Q. I will ask you if you were accustomed to doing any switching on Sunday in July, 1912?

A. If I remember correctly, only on special occasions.

Q. I will ask you if any switching was done on Sunday, the 28th of July, 1912 by the switch engine and crew?

A. Not that I remember; no, sir.

Q. In fact, there was no switching done that day?

A. Not that I remember of.

Q. Who was the engineer in charge of the switch engine at that time?

A. If I remember correctly, Mr. Rollins; I won't be positive.

Q. Now, I will ask you when coal was thrown into the pockets and a report of the amount that was taken away by the engines had to be filed in your office, who did that?

A. That is, what turned in the coal tickets?

Q. That's it?

A. It had been customary for Mr. Turner to bring the coal tickets to my office.

Q. Did he have an accustomed hour to do that?

A. Well, all the way from four o'clock to six; and sometimes later, no certain hour.

Q. But always in the evening?

A. Almost generally, yes, sir.

Q. For what period of time did those coal tickets cover?

A. All the way from four to six o'clock the day before up to the time that he turned them in.

Q. Do you keep any register of the number of trains that come into your station?

A. Yes, sir.

Q. You keep a register?

A. That is, it is kept at the passenger office.

Q. Now, I will ask you what you recollect about engines taking coal, what was the duty of the engineer in charge of the engine?

A. Well, as far as I know it was his duty to leave a coal ticket.

Q. Where did he put that coal ticket?

A. They have a box placed on the side of the chute for that purpose.

Q. Can you tell me as a rule what a coal ticket ordinarily contained upon it?

A. The date, the engine number, the number of the train, the number of tons taken, the engineer's name and the fireman's name.

Q. Then it was papers of that character that had been turned in to you habitually by Mr. Turner from four to six o'clock every day?

A. Yes, sir.

Q. Now, I will ask you if you have in your possession at this time a card of about the size of a coal ticket?

A. No. I have not.

Q. For the purpose of enabling you to show to the jury about what size a coal ticket is, will you have the kindness to cut that blotter into a form of about the size a coal ticket would be? (Exhibiting to witness small blotter).

A. That is just a fraction larger, I believe. (Witness cuts blotter to a size about 2 1-2 inches by 2 1-8 inches.)

Q. Are there any other entries upon a coal ticket except what you have stated?

A. None that I remember of now.

Q. I will ask you if any portion of a coal ticket was printed?

A. Yes, sir.

Q. What part was printed?

A. Well, as near as I can remember it is the blank for the Engine number, the train number, "Engineer" and "Fireman" and the blank for the number of tons taken and the estimated number of tons taken.

Q. You mean that those words were so printed upon the ticket that they could be filled in to show, for instance, the train number, and then the engineer would put the number opposite that?

A. Yes, sir.

Q. Then when a coal ticket was filled and completed you could tell from it what engineer got the coal, could you?

A. Yes, sir.

Q. And how much he got?

A. Yes, sir.

Q. And when he got it?

A. Yes, sir.

Q. Did it give the hour of the day when taken?

A. No, sir.

Q. Of what use were those coal tickets to the Rock Island railroad?

By W. H. Moore—

If your honor pleases, it seems that this is unnecessary detail; otherwise, I have no objection to it.

I don't see the necessity of the detail, Colonel.

By Jno. C. Moore—

We can infer what the use of the coal tickets are, but whenever we—

By the Court—

Well, let him answer the question.

By the witness—

A. To show what became of the coal that was unloaded and in what way it was used.

By Jno. C. Moore—

Q. Did it not also serve you for the purpose of keeping your coal account correct?

A. Yes, sir.

By Jno. C. Moore: "You may cross-examine."

CROSS EXAMINATION BY W. H. MOORE:

Q. Mr. Wallace, where were you, if you know, at the time Mr. Turner was killed?

By the Witness—

A. I was in the local freight office.

Q. How long after he was killed, if you know, did you receive notice of his death?

A. I could not say as to how long, but it could not have been very long.

Q. Did you go to his body?

A. Yes, sir, I did.

Q. Where with reference to the freight house was his body lying?

A. Well, I could not say exactly, but it was east of the freight ware room.

Q. The railroad runs there generally north and south?

A. Yes, sir.

Q. And the freight house sits on the west side of the track?

A. Yes, sir.

Q. And he was somewhere east of the freight house?

A. Yes, sir.

Q. I will ask you to look at this blue print that I hand you, which locates the depot here

(Indicating on blue print) and the freight house here (Indicating), is that about a correct representation of the yard down there?

A. Well, yes, it looks like it was.

Q. This where I have my pencil is shown as the north line of the depot? (Indicating on blue print.)

A. Yes, sir.

Q. Was his body north or south of that north line of the depot?

A. If I remember, it was south of the north line of the depot.

Q. What is your judgment, how far south of the north line of the freight depot was the body lying?

A. That I could not say, because I have no recollection as to how far it was.

Q. But it was somewhere in that neighborhood?

A. Yes.

Q. You say there was a string of flat cars on the house track next to the freight depot?

A. There was cars on the house track.

Q. In going from the freight depot to the body which way did you go to the body?

A. I went off of the north end of the platform around the cars but I could not say how far north I went before I went around the cars.

Q. In going north you were going towards the passenger depot?

A. Yes sir.

Q. How many people were there when you got there?

A. Well, as near as I remember there was no one there but the conductor; they were coming from all around though.

Q. You have testified in regard to these

coal tickets that Mr. Turner usually turned in at the freight depot, do you know whether or not he had turned in his coal tickets on this day prior to the time he was killed?

A. No, sir, he had not.

Q. How do you know that?

A. Because I remember going for the tickets after it happened myself.

Q. Where did you go after those tickets?

A. I went to the coal chutes.

Q. What time of day did you go to the coal chutes, do you know?

A. I could not say as to the hour.

Q. But some time that afternoon.

A. Yes, sir, some time after this happened.

Q. Did you get the coal tickets there?

A. I got some coal tickets, yes, sir.

Q. You didn't see anything of the actual happening of the occurrence there?

A. No, sir.

Q. Did you see "24" come in that evening?

A. Well, no; I have no recollection of it.

Q. Those trains come and go there and unless your attention is called to them specially you pay but little attention to them?

A. Yes, sir.

#### RE-DIRECT EXAMINATION.

By Jno. C. Moore—

Q. You say you went to the body of Mr. Turner?

By the witness—

A. Yes, sir.

Q. Which direction did you go from the freight house in order to get to the body?

A. Well, I went out of the north door of

the freight office and went down to the end of the platform at the north end and went around the cars, but I could not say how far I went before I went around the cars.

Q. There was one or two cars standing on the house track north of the incline?

A. I could not say; I went to the north end of the platform and if I remember right I went around a car.

Q. When you got to the body how many persons were there?

A. Well, as near as I can remember there was no one standing close by except the conductor, who called my attention to this.

Q. What was his name?

A. Conductor Bavington.

Q. There was not other person right close to the body?

A. Not that I remember of.

Q. Did you see the undertaker there?

A. Yes, sir, he came.

Q. He came after you did?

A. Yes, sir.

Q. Did you see the Justice of the peace or Coroner?

A. I saw Mr. Smith there, yes, sir.

Q. He came after you did?

A. Yes, sir.

Q. At the time you went there where was the engine and cars that ran over him standing?

A. North of him.

Q. About how far?

A. I could not say as to that.

Q. As much as two or three car lengths?

A. I could not say, because I don't know how far it was.



Q. Did you see Mr. George Wallace in the cab?

A. No, I have no recollection of seeing him in the cab.

Q. Did you see Mr. Vick Reems in the cab?

A. No, sir.

Q. Did you see Mr. Portelle or George Kendrick on or about the train?

A. Not at that time, no.

Q. I will ask you if you saw George Wallace, Victor Reems, Mr. Portelle or Mr. Kendrick standing around among those who were standing in close to the body?

A. I remember seeing them there, but I don't remember who they were talking with.

Q. I will ask you if you went up to the body and looked at it?

A. Yes, sir.

Q. In what manner was it lying?

A. If I remember correctly, he was lying with his face down with his hands out, and one foot over the rail I believe was cut off. That is as near as I can remember.

Q. Which way was the head?

A. East.

Q. And the foot cut off where was it?

A. On the west rail.

Q. Was there any injury to the head?

A. Yes, sir.

Q. By what rail was that injury done?

A. Well, I don't know what track it was; it was the rail east of where his body was lying.

Q. It was the rail of the same track was it?

A. Yes, sir.

Q. The east rail of the same track was it?

A. Yes, sir.

Q. How many persons were there when you got there?

A. As near as I can remember there was no one but the Conductor.

Q. Were there other persons standing farther away?

A. There was people coming from all directions.

Q. But you were among the first to get there?

A. Yes, sir, I was.

Q. As you approached, did you see the Conductor touch the body?

A. I did not.

Q. Did you notice anybody touch the body?

A. No, sir.

Q. I will ask you if from the position of the body you can testify whether it was touched by anybody after the train ran over it?

A. I saw no one touch it.

Q. You saw it very shortly after he was killed?

A. As soon as I could get there, yes, sir.

Q. Did you see the engine No. 2113 or 2131 and the cars that were attached to it stop?

A. No, sir, I have no recollection of that.

Q. Did you hear them stop?

A. Well, no.

Q. Did you hear them stop twice?

A. No, sir, I have no recollection of that.

Q. Did you hear them stop and start?

A. I have no recollection of that.

By Jno. C. Moore: "That is all."

RE-CROSS EXAMINATION.

By W. H. Moore:

Q. Who gave you the information in regard to some one being killed down there?

By the witness:

A. Mr. Bavington.

Q. Did he come to the depot there?

A. Yes, sir.

Q. Did he go back with you?

A. No, sir, ahead of me.

Q. How long after he gave you the information did you go over?

A. Well, I could not say; it could not have been longer than two or three minutes.

By W. H. Moore: "That is all."

WITNESS EXCUSED.

J. J. Rawlins, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. State your name?

By the Witness:

A. J. J. Rawlins.

Q. What is your occupation?

A. Engineer—locomotive engineer.

Q. How long have you been in that service?

A. Thirty years.

Q. Of what Company are you an employe?

A. The Rock Island.

Q. I will ask you what was your service on the 28th day of July, 1912, Sunday, the day William L. Turner was killed, if you can remember?

A. I don't work on Sundays; I was at home?

Q. What engine did you have charge of at that time; that is, those weeks?

A. Engine No. 1222.

Q. What is the kind of engine?

A. She is what we call a simple engine.

Q. What were its duties?

A. She done the switching here in the yards and went to Billings and back.

Q. There were no other duties for that engine to perform?

A. Only in cases of emergency.

Q. I will ask you if you can remember if you were doing switching in the yard or if you had gone to Billings and back on the 28th day of July, 1912?

A. No, I was not working that day; if it was on Sunday I was not working.

Q. I will ask you if there was any more than one switch engine in use in Enid at that time?

A. No, sir.

Q. If there was any switching done at that time it was not by this engine?

A. No, it was by a road engine. We work six days in the week and then we lay over on Sunday, and on Sunday the road engines usually do their own switching.

Q. Did you know George Wallace at that time?

A. Yes, sir.

Q. Do you know what engine he was running at that time?

A. No, sir, I do not. They run the engines as they want them and the men take their turns.

Q. Road engines that run freight trains have a certain series of numbers by which you can tell whether it is a road engine or not by number?

A. Not necessarily; sometimes they take the engines for switch engines, the 1200 class, that is a smaller engine than a road engine; sometimes they work them in the yard and sometimes on the road! the 2100 class they don't work as switch engines only in transit along the line; if a train comes over and stops and they have any cars to set out they do it with that engine; they don't use them as switch engines.

Q. The 2100 class is a road engine?

A. Yes, sir.

Q. And it is not used for switching purposes except for its own use?

A. That is it.

Q. If engine 2113 pulled into Enid on the 28th day of July, 1912 it pulled in as a road engine, did it?

A. Yes, sir.

Q. If it came from the north where would be the point of origination of a train pulled by that engine?

By W. H. Moore—

We object as incompetent, irrelevant and immaterial and asking for a conclusion of the witness.

By the Court:

If he knows.

By W. H. Moore—

Defendant excepts.

By the witness—

A. Where the train would originate you mean?

By Jno. C. Moore—

Q. Yes, sir?

A. They make the train up at Caldwell, Kansas, and they have through loads for different points south leaving Caldwell, and probably they will have their stuff along to set out and the balance go on, and as they reduce along the line, if there is cars to go they pick them up to replace the ones that they set out so that they will have their tonnage, and El Reno would be the destination of that crew.

Q. Starting from where?

A. Caldwell, Kansas.

Q. Then when 2100 came in here its destination was El Reno and it came from Caldwell?

A. Yes, sir.

Q. Now, you say you have had thirty years experience as an engineer?

A. Yes, sir.

Q. I will ask you if an engine of the type of 2113 with its tender and two box cars loaded and a flat car loaded are backing on a track at the rate of ten miles an hour, in what distance could that train be stopped if the full air was applied?

A. Well, it would depend on circumstances and the condition of your brakes; if your brakes were in proper condition on the three cars and the locomotive going ten miles an hour, it would stop in sixty feet.

Q. In sixty feet?

A. Yes, sir.

Q. If the brakes were in good working order?

A. Yes, sir.

Q. Now I will ask you in what distance

it would take to stop that train if they were going five miles an hour?

A. Well, you could just cut it in two; if you are going five miles an hour you could probably stop in thirty feet if everything was in working condition, if the rail was in good condition so that the wheels would not slide and everything favorable, it might go a little further or not quite so far you know.

Q. In case the train was going at fifteen miles an hour and the air was applied to all the wheels, how far would it run before stopping?

A. Just increase the distance of stoppage at the same rate.

Q. So there is a kind of rule there about that?

A. Yes. After you get above a certain speed, of course, your brakes will take hold, but it don't have the effect on them after you get to 45 or 50 miles an hour, as long as you are between 20 and 25 the momentum of the train going 45 or 60 miles an hour has a greater tendency to pull in your brakes but they would be a little harder to stop in going 15 or 20.

Q. I will ask you what would be the distance according to your knowledge if the train was proceeding at the speed of 25 miles an hour?

A. Well, it would be a little harder, the resistance, the momentum of the train; the resistance would be as great but don't take effect on account of the motion of the train quite as quick as it would at ten miles an hour, and consequently, would go more than as far again probably as it would ten or twelve miles an hour—not very much though.

Q. Well, a train running then at ten miles an hour and applying the brakes should stop at sixty feet?

A. Yes, it should stop within sixty feet or near about that; that is if it is put on with full force.

Q. Did you know Mr. Turner during his life time?

A. Yes, sir.

Q. How long have you known him?

A. I judge about six or seven years as near as I can remember.

Q. You knew the character or service and labor he was performing?

A. Yes, sir, he was contractor for the Company I believe, to shovel their coal out of the cars into the chutes; he was at Caldwell; he had charge of Caldwell, Enid and Dover for awhile.

Q. This was company coal that he was handling, was it?

A. Yes, sir, I think so.

Q. Were you with him at any time he was performing his labors?

A. Oh, I would see him every day.

Q. I will ask you what you know about his coopering cars in the yard?

By W. R. Moore—

This is all covered by contract, and there is no dispute but what he did the work.

By the Court—

I don't see the materiality of it.

By W. H. Moore—

We don't deny that he did the work.

By the Court—

Well, they can show affirmatively that he



did the work; objection over-ruled. Exception allowed.

By the witness—

A. The coopering of cars was to get them in condition to haul grain in them; they have some burlap and also they have some pieces of board to put over the holes where there is any hole in the car, and then side them up to the top of the door and leave a hole so that the spout would go in between the roof and the door and then they put burlap in there to keep the grain from running out of any hole, the jostle of the cars, if there is a little hole, the grain runs out.

By Jno. C. Moore—

Q. Did you see Turner performing those duties?

A. No, I have seen him with the material, but I never was in the car and seen him working.

Q. Did you see him at the chutes?

A. Yes, sir.

Q. Did you occasionally take coal from the chutes?

A. Every day.

Q. And that engine every day except Sundays ran to Billings?

A. Yes, sir. I mean every day except Sundays, and some Sundays I have worked.

Q. Have you any recollection of Train 95 coming as an extra on the 28th of July, 1921?

A. No, sir, I was not at the depot that day.

By Jno. C. Moore:

That is all.

#### CROSS EXAMINATION.

By W. H. Moore:

Q. How long have you known George Wallace?

A. For about nine or ten years.

Q. There are a good many things in running an engine that enter into how long it will take it to stop?

A. Yes, sir.

Q. Those engines backing up in that way, suppose the engine had behind it a box car and a flat car loaded with machinery and was backing, the engineer in order to keep a look-out would be required to look away out of his window?

A. Yes, sir.

Q. Where would his air be on a 2100 engine?

A. Those engines are equipped with the straight air and automatic also, but I think he has a New York brake valve and would have to reach over to get it.

Q. And if his train was backing he would be looking back this way. (Indicating by looking backward.)

A. If he was going north he would be doing like this (Indicating) with his hand this way (Indicating) to get hold of the brake valve.

Q. Suppose that train as I have described, a 2113 engine, with a loaded box car and a flat car loaded with threshing machinery headed south was backing on to track two at the rate of eight or ten miles an hour, with a brakeman riding as you have described leaning out of his window looking backward, and supposing he would get a stop signal followed almost instantly by a violent stop signal; that in response to the first signal he would grab

his air and throw it into a service stop and then into the emergency, how far would you say that train would run before it stopped?

A. It takes time to do all this—

Q. Tell the jury how long it would take him to see those signals and understand them and make the application and stop his train?

A. It would take him almost as long as it would to stop it; because, if he got a stop sign or anything like that, when you put the emergency on you are liable to tear off your brake or jerk somebody off.

Q. When an engineer coming under these conditions driving down on track 2— How is the signal given?

A. They generally give both hands.

Q. Suppose I am riding like this and I give him that (Indicating by arms) that is a stop signal?

A. Yes, sir.

Q. Now then unless there was something about that signal, unless it is violent or something of that kind—

A. If it was like that (Indicating violent with arms) you would know there was something wrong.

Q. An ordinary stop signal would the engineer throw it into the emergency?

A. No, sir, there is orders not to do it, because so many are jerked off; if a man gives an emergency stop he is looking for it and is braced.

Q. Let me give you this condition: Suppose this train was coming down as I have told you, one flat car and a box car, loaded, with a brakeman sitting on the corner of the flat car, and as the man in front of the car

steps on to the rail, suppose a step over, the brakeman gives it to the engineer like that (Indicating violent stop signal) how far would that train run before it would stop?

A. It is not a matter of minutes when a train is moving how far it will go, it is a matter of seconds, and it takes so many seconds to get to it; it takes so many seconds to do this work, and would probably travel ten or fifteen feet—ten feet, say, before the brakeman would take hold and after the brakes are on it ought not to go over two car lengths or such a matter.

Q. Suppose you were on an engine of that kind, a 2100 engine, with a loaded box and a flat car, and a man would step on your track 50 or 75 feet in front of the train, you going ten miles an hour, and the brakeman would give you a stop signal as soon as he realized the man's danger, what are your chances to save hitting that man if he stays on the track?

A. Well, the chances are that a man might accidentally stop if everything was working right as it should work, if his brakes on the engine are working and the man was 50 or 75 feet away, you could probably get stopped may be; but you cannot always tell, you know, how long it is from the time that the signal is given or whether it is realized and whether it is handled like it would be handled in a case of emergency.

Q. Suppose that you were running an engine, you were sitting in your cab, and you know there is a test to be made, you know a man standing down there is going to give you a signal and you are watching for it, you can stop your train much quicker under those cir-

cumstances than you can where the emergency jumps before you all at once?

A. Yes, sir, if you know what you are going to do and when to do and when to do it.

Q. Have you had any experience in accidents of this kind?

A. I never hit a man in my life.

Q. You never hit a man in your life in your thirty years?

A. No, sir.

Q. When these accidents of this kind happen, it is a very startling thing to see a man come in front of your train like that?

A. Yes, sir.

Q. Very often when that happens, when a man steps in front of a train, if a man's nerves are not unusually steady it will be a second or two before he steadies himself down to do the necessary thing, is that true?

A. Yes, sir. I had two little children playing at the side of the track out this side of Mountain View; I was coming along and they were playing at the side of the track; they heard me coming, and they lived on the other side of the creek and they jumped on the track and started to run across that bridge—I expect there is a man here who was on the train, Teddy O'Brian, foreman of the bridge gang—those two little children, a little boy and a little girl, probably seven and nine years old, started to run across that railroad bridge and I didn't think there was any possible show for me to stop, and they could not go to one side of the track because they were over the creek, but just as soon as I saw them start across the bridge, I slammed the emergency on and put the engine to the back motion on sand, and I

ran out on the pilot and stood on the pilot—you call it the cow-catcher—and I reached my hand down like this (Indicating) and I got up as close as from me to the Judge (Five feet) and she stopped; I was going to catch the little girl. I was not a bit excited until the little girl ran across the bridge, and after I stood there for a minute, I was so nervous I could hardly crawl into my engine.

Q. This case that you have just told about when you stopped within eight or ten feet of the children, suppose a man had seen that instead of you seeing it and had to give you a signal—

A. I would have ran over them.

Q. You would have run over them in spite of the world?

A. Yes, sir.

By W. H. Moore:

That is all.

REDIRECT EXAMINATION BY JNO. C.  
MOORE:

Q. The effect of a dangerous position is to give you the nerve to act immediately?

By the witness:

A. Yes, sir.

Q. Isn't that the effect upon men in general?

A. Yes, sir, but if you see anything with your own eyes it makes it different.

Q. For the person who does see the danger?

A. It is bound to unnerve you.

Q. It didn't unnerve you to take care of those children?

A. Not until afterwards.

Q. When he sees the danger he begins to act?

A. You have got to act in cases of that kind every day; the public don't know what an engineer has got to do, for the minute you quit watching that minute you are going to get into trouble; you cannot quit watching.

RECROSS EXAMINATION.

By W. H. Moore:

Q. Isn't it a question of speed in those cases lots of times?

By the witness:

A. Yes, indeed. Lots of times you cannot act quick enough, going 50 or 60 miles an hour.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

MRS. W. L. TURNER, a witness, of lawful age, being first duly sworn by the Clerk of the Court, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. You are the widow of the deceased, Wm. L. Turner?

By the witness:

A. Yes, sir.

Q. State the date of his birth?

A. He was born January 4, 1866.

Q. When did he die?

A. July 28th, 1912.

WITNESS EXCUSED.

B. M. TANNER, a witness, of lawful age, being recalled as a witness for Plaintiff, testified on oath as follows:

By Jno. C. Moore:

Q. Mr. Tanner, kindly read into the

record the expectancy of the deceased, Wm. L. Turner, founded upon those dates of his birth and death?

By the witness:

A. That age would be 46; and the expectation of life is given as 23 years and 295 days.

By Jno. C. Moore:

That is all.

WITNESS EXCUSED.

W. M. HUTCHINSON, a witness, of lawful age, being first duly sworn, and being recalled as a witness upon the part of Plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. Mr. Hutchinson, you may state when you and Mr. Turner heard the whistle of train number 24, what Mr. Turner did and said?

By W. H. Moore:

May it be understood that this all goes in subject to our objection. We object as incompetent, irrelevant and immaterial, calling for a conversation with the deceased not in the presence of the defendant and no part of the *res gesta*.

By the Court:

Objection over-ruled, and admitted for the purpose of explaining his conduct in going across the tracks of the defendant.

By W. H. Moore:

To which the defendant excepts. And it is understood that as the other questions of this character come in that the same objection goes to it.

By the Court:

Very well. I think the form of that



question might be changed a little; what, if anything did he do; it might be admissable as verbal acts.

By Jno. C. Moore:

Q. State when you and Mr. Turner heard train 24 whistle for the station, what did Mr. Turner do, if anything?

By the witness:

A. He pulled out his watch and said, "There is 24; I will have to take my tickets to the freight depot and go and order coal for the chutes."

Q. Which way did he go then?

A. He turned around and walked back west towards the freight depot.

Q. I will ask you when you came to the first row of cars through which you passed over the bumpers, if you noticed how far south that row of cars extended?

A. No, sir, I didn't notice it exactly how far it extended.

Q. They extended far enough, however, that you concluded to go between the bumpers rather than go around it?

A. Yes, sir.

Q. I will ask you when you came to the next row of cars how far south that row extended?

A. Well, sir, I never paid any attention to how far it extended.

Q. Did it extend any farther south than the first row?

A. I could not say exactly, but it extended quite a ways.

Q. It extended, however, far enough south that you concluded to go across the bumpers rather than to go around it?

A. Yes, sir.

Q. I will ask you when you came to the third row of cars how far south that row of cars extended?

A. I never paid no attention to how far south it extended.

Q. Did it extend so far south that you concluded to go through the bumpers rather than go around them?

A. Yes, sir.

Q. I will ask you which of these three rows of cars extended the farthest south?

A. Well, sir, I believe the first row extended farthest south.

By the Court:

Q. Do you mean the east row?

By the witness:

A. Yes, sir.

By Jno. C. Moore:

Q. But still the other rows extended sufficiently far that you concluded to go between the bumpers rather than go around them?

A. Yes, sir.

Q. Now, if Mr. Turner didn't go between the bumpers but went around those trains of cars, would that with your knowledge of the extent of that row of cars have caused him to be farther south than the north end of the freight depot?

A. Yes, sir.

Q. When you went to the body where Mr. Turner lay did you notice any cars upon the house track next to the freight depot?

A. Yes, sir, there was cars.

Q. I will ask you if any of those cars extended farther north than the platform of the freight house?

A. Yes, sir, they extended about two or three cars.

Q. In order to reach the freight depot it would be necessary then for Mr. Turner to go south farther north than the point where his body lay, is that right?

A. Yes, sir.

CROSS EXAMINATION.

By W. H. Moore:

Q. Where was the body of Mr. Turner lying with reference to the freight depot?

By the witness:

A. He was lying east of the freight depot.

Q. Any south of the north end of the freight depot?

A. Well, sir, I could not just positively say.

Q. He was east of the freight depot and you don't know whether he was north or south of the north line of the depot?

A. No, sir, I could not positively say.

Q. What is your best judgment?

A. Well, as near as I could judge I would think it was lying about opposite the center of the freight depot.

Q. Are you well enough acquainted with the lay of the land there to give us some idea how far that would be from the water crane, give your best judgment—from the water crane to where he was lying?

A. Well, I don't know exactly, but I have an idea it was better than 500 feet, just guessing at it.

Q. Something near 500 feet?

A. Something like that.

Q. What kind of a pipe was he smoking that afternoon?

A. Well, sir, he had a meerschaum pipe.

Q. Did you see the pipe lying there on the ground?

A. Yes, sir.

Q. That was a meerschaum pipe that you saw him light?

A. Yes, sir.

By W. H. Moore: "That is all."

WITNESS EXCUSED.

DEPOSITION OF HESS CONWAY.

DEPOSITIONS of witnesses taken to be used in an action pending in the District Court of the Twentieth Judicial District of Oklahoma, in and for Garfield County, Oklahoma, wherein A. P. Bond, Administrator of the Estate of William L. Turner, deceased, is plaintiff and Chicago, Rock Island and Pacific Railway Company, a corporation, is defendant, in pursuance with the notice hereto attached and at the same time and place therein stated. The said A. P. Bond, Administrator, plaintiff, appeared by John C. Moore, his attorney, and the Chicago, Rock Island and Pacific Railway Company, defendant, by J. G. Gamble, its attorney; and thereupon the said plaintiff produced the following witnesses in order, to-wit:

HESS CONWAY, of lawful age, who being first duly sworn, deposeth and saith:

DIRECT EXAMINATION.

By John C. Moore:

Q. State your name?

A. Hess Conway.

Q. Did you know William L. Turner at Enid?

A. I did.

Q. Do you remember about his being killed there on Sunday, July 28th of last year?

A. I do.

Q. What were you doing that afternoon?

(Objected to by J. G. Gamble, attorney for defendant, as being incompetent, irrelevant and immaterial.)

By the Court: (At trial) "Objection over-ruled; exception allowed."

By the witness:

A. I was shoveling coal on the chutes.

Q. For whom?

A. Mr. Turner.

Q. Did you see him that afternoon?

(Objected to as calling for irrelevant and immaterial evidence.)

By the Court: "Over-ruled." (At trial.)

By Mr. W. H. Moore: "Defendant excepts." (At trial.)

A. I did not see him until I got my car emptied. I had it all out before I seen him.

(Defendant moves for the exclusion of the testimony for the reason that it is irrelevant to any of the issues in this case.)

By the Court: "Motion refused; exception allowed."

Q. Where did you see him?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Objection over-ruled."

By W. H. Moore: (At trial) "Defendant excepts."

A. I went up to where he and Mr. Nelson was loading a car of coal, they was loading a car of coal for the mill. They were loading a

car of coal right between the Texas Oil House and the Ice Plant.

Q. What, if anything did you say to Mr. Turner about the coal on the chutes being all unloaded.

(Defendant objects for the reason that the question calls for irrelevant, incompetent testimony, because it seeks to elicit a conversation with a dead man had in the absence of the defendant or any of its agents, because it is not a part of the *res gestae* and because the question is leading and suggestive.)

By the Court: (At trial) Objection overruled.

By W. H. Moore: (At trial) "Defendant excepts."

A. I told him that it was all unloaded.

(Defendant moves the exclusion of the answer of the witness upon the same ground assigned to in last preceding question.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: (At trial) "Exception."

Q. Were there more than one car of coal on the chutes at that time?

(Defendant objects as calling for irrelevant and immaterial testimony.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: (At trial) "Exception."

A. No, sir, there was not but the one car up there.

Q. Do you know when it was set on the chutes?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: "Exception."

A. No, sir, I do not know when it was set.

Q. When you told Turner that the coal was all unloaded, what did he say and what did he do?

(Defendant objects as calling for incompetent, irrelevant and immaterial evidence; because the question asked seeks to elicit a self-serving declaration with a dead man not had in the presence of the defendant or any of its agents; because the question calls for matters not properly a part of the *res gesta*

By the Court: (At trial) "Objection sustained."

By Jno. C. Moore: "Plaintiff excepts." (At trial.)

A. (Not read to the jury) Well, he said, "I will go down and gather up the tickets and order a car of coal for the morning."

Q. What did he do?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: "Exception."

A. He just started down the car towards the chutes; he stepped out of sight; I did not know where he went after he went out of my sight.

A. Are you acquainted with a passenger train called Number 24?

(Defendant objects as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: "Defendant excepts."

A. I am.

Q. Was this conversation with Turner

and his going towards the chutes before or after Number 24 arrived that evening?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: "Exception."

A. Before.

Q. Did you see Turner's body after he was killed?

A. I did.

Q. Did you see the cars and the engine that ran over him and killed him?

A. I seen the engine and cars that they told me run over him.

(The defendant moves the exclusion of the answer of the witness for the reason that it is incompetent, irrelevant and immaterial as evidence, and also based upon hear-say.)

By the Court: (At trial) "Sustained."

Q. Did you see the engine and cars standing on the same track on which his body lay?

(Defendant objects as irrelevant and immaterial.)

By the Court: (At trial) "Over-ruled."

By W. H. Moore: "Exception."

A. I did.

Q. Which way from him?

A. North.

Q. About how far?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

A. It was just about four or five car lengths.

Q. Which way was the engine facing?

A. South.



Q. Were there any cars in front of the engine and between it and Turner's body?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) Over-ruled; exception allowed.

A. No, sir.

Q. Can you describe how the body lay?

(Objected to as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

A. Yes, sir.

Q. You may state regarding it? How it lay and in what manner it was injured?

(Objected to as calling for irrelevant and immaterial evidence by defendant.)

By the Court: (At trial) "Over-ruled; exception allowed."

A. Well, sir, he fell with his face downward and just the top of his head was cut off and one foot was off.

(Defendant moves the exclusion of the answer of the witness for the reason that it is irrelevant and immaterial.)

By the Court: "Motion refused."

Q. On which rail was his head injured?

(Defendant objects on the ground of irrelevant and immaterial evidence, calling for a conclusion of the witness without facts stated in support thereof.)

By the Court: (At trial) "Over-ruled; exception allowed."

A. The east rail.

Q. On which rail was his foot cut off?

(Objected to by defendant as calling for irrelevant and immaterial evidence, for the

conclusion of the witness without facts in support thereof.)

By the Court: (At trial) "Over-ruled."

A. The west rail.

Q. Where was the foot lying with reference to the rail?

(Objected to by defendant for the reason that it calls for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

A. On the west side of the rail.

Q. I will ask you to state if any portion of his head lay on the east side of the rail?

(Objected to by defendant as calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled; exception allowed."

A. I did not see any lying there because I did not go around there on the east side of him.

Q. How far towards the eyes and the ears was the head injured?

(Objected to, calling for irrelevant and immaterial evidence.)

By the Court: (At trial) "Over-ruled."

A. Down towards the eyes and ears I could not tell you because he lay on his face and I did not see that part.

Q. Was the top of his head still attached or had it been crushed away?

(Objected to by defendant as irrelevant and immaterial.)

By the Court: (At trial) Over-ruled; exception allowed.

A. Why, it had been crushed away.

Q. How long had you known Turner?

A. I had known him for twenty-eight months.

Q. What was his physical condition and health?

(Objected to by defendant as calling for irrelevant and immaterial evidence, for the conclusion of the witness without facts shown in support thereof, for the opinion of the witness without his having been shown qualified.)

By the Court: (At trial) Over-ruled; exception allowed.

A. Good.

#### CROSS EXAMINATION.

By J. G. Gamble:

Q. Who were you working for on July 28th, 1912?

A. Mr. Turner.

Q. Who paid you for your work in unloading coal on the chutes at Enid?

A. Mr. Turner did up to that time.

Q. Under whose directions were you working on July 28th, 1912?

A. Mr. Turner's.

Q. How long had you been working for Mr. Turner prior to that time?

A. Ever since July 2nd.

Q. Of the same year?

A. Yes, sir.

Q. Did you continue working on the chutes at Enid after Mr. Turner's death?

A. Yes, sir.

Q. For how long did you so continue?

A. All through August.

Q. Please state when and how many cars of coal were set to the chutes at Enid immediately before Mr. Turner was killed. By im-

mediately, I mean the last time before he was killed?

A. I do not know when, I know how many.

Q. When and how many cars of coal were set to the chutes after Mr. Turner's death?

(Plaintiff objects because it is an unlimited time, indefinite, uncertain, incompetent, irrelevant and immaterial.)

By the Court: (At trial) "Sustained."

A. (Not read to jury) I could, not tell. After he was killed I could not tell.

Q. Can you tell the first time when coal was set to the chutes after Mr. Turner's death?

A. Monday morning.

Q. At what time on Monday morning?

(Objected to by plaintiff as immaterial.)

By the Court: (At trial) "Over-ruled."

A. It was set before seven.

Q. I will ask you to state if it is not a fact that at the time Turner was killed there were cars containing coal on the chutes of the defendant at Enid?

A. No, sir.

Q. I will ask you to state if it is not a fact that no coal other than what was on the chutes at the time Turner was killed was set to the chutes for a period of at least two days after he was killed?

(Objected to by plaintiff as immaterial.)

By the Court: (At trial) "Sustained."

A. No, sir; there was coal set there Monday morning. (This last answer not read to jury, objection being sustained.)

Q. How much coal was there in the

(Objected to by plaintiff as immaterial.)

By the Court: (At trial) "Over-ruled."

A. I could not tell just how much there was in the chute; I know how much I threwed out of the car Sunday.

Q. Was the pockets full or empty?

A. Most of them was empty.

Q. How many pockets to the chutes?

A. Twenty-two; there is eleven on each side, double chutes.

Q. How many of those twenty-two pockets had coal in them?

(Objected to as immaterial.)

B Jno. C. Moore: (At trial) "Objection withdrawn."

A. No, I could not tell how many pockets had coal in them, because I do not know how much they had in them when I commenced.

Q. How much coal did you unload that day?

A. I throwed out about twenty tons.

Q. Did you see Turner when he was killed?

A. No, sir.

Q. You do not know of your own knowledge what part of the engine struck him?

A. No, sir.

Q. About what time was it that you first saw his body?

A. Why, it was after twenty-four had come in.

Q. How long thereafter?

A. I could not tell exactly how long afterwards.

Q. Did you go up to where his body lay?

A. Yes, sir.

Q. Was there an one else there at his body at the time you arrived?

A. Yes, sir.

Q. Do you know whether or not the engine and cars to which you referred had been moved after Turner was struck, and before you saw them?

A. I could not tell.

Q. They might have been moved then?  
(Objected to by plaintiff as calling for an opinion and not evidence at all.)

By the Court: (At trial) "Over-ruled."

By Jno. C. Moore: (At trial) "Exception."

A. They might have been.

Q. Do you know whether or not Turner's body had been moved any way after he was struck before you saw him?

A. No, sir, I don't.

Q. It might have been moved then, might it not?

A. As far as I know.

Q. As far as you know what?

A. It might have been moved.

Q. What time of the evening did you finish unloading the car of coal on the chutes?

A. Directly after four o'clock.

Q. Did you go immediately to where Turner was and hold the conversation with him that you have stated?

A. I did.

(Signed) HESS CONWAY.

Both parties now announce that this is all the testimony they care to offer.

Subscribed and sworn to before me this 18th day of Oct. 1913.

C. F. CHAPMAN, Notary Public.

My commission expires Apr. 19th, 1914.  
(Seal)

MRS. W. L. TURNER (Ida Turner), a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. I will ask you, Mrs. Turner, if you are the widow of William L. Turner, deceased?  
By the witness?

A. I am.

Q. And the mother of the children?

A. Yes, sir.

Q. You may state when Mr. Turner was born?

A. He was born January 4th, 1866.

Q. You may state when you were born?

A. I was born August 29th, 1872.

Q. You may state the date of Vera's birth?

A. A Vera was born on the 22nd day of January; she will be seventeen this coming January; I cannot state the year without figuring it up.

Q. You may give the date of Mary's birth?

A. Mary was born on the 26th day of January.

Q. What year—or how old will she be next January?

A. She will be twelve years old on the 26th of January.

Q. You may state the date of Dorothy's birth?

A. The 23rd of September. She will be ten next September; she is nine this year.

Q. She was nine last September?

A. Yes, sir.

Q. You may state the date of Willie's birth?

A. He was born on the 10th day of July, and is seven years old last July.

Q. You may state the date of Bessie's birth?

A. Bessie was born on June 11th.

Q. How old is she now?

A. She was six in June.

Q. You may state the date of Austin's birth?

A. Austin was born May 22, 1912.

Q. How old was he when his father was killed?

A. Two months and eight days.

Q. They are all living, are they?

A. Yes, sir.

Q. Living with you?

A. Yes, sir.

Q. You have their care and management, have you?

A. Yes, sir.

Q. You may state what time you and Mr. Turner moved to Enid?

A. Well, it was in September, I think, 1906, but I am not positive whether it was 1906 or 1907.

Q. Where had you lived prior to that time?

A. At Dover, Oklahoma.

Q. Was he in the service of the railway company at Dover?

A. Yes, sir, he was.



Q. And continued in the service of the company here?

A. Yes, sir.

Q. I will ask you if you know about what his earnings were annually, from his service with the railway company and other labor performed?

By Mr. Gamble:

We object as incompetent, irrelevant and immaterial.

By the Court:

Over-ruled.

By Mr. Gamble: "Defendant excepts."

By the witness:

A. Yes, sir.

By John C. Moore:

Q. About how much was it?

By Mr. Gamble:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Excepton."

By the witness:

A. On an average of \$125.00 a month.

By Jno. C. Moore:

Q. \$125.00 a month?

A. Yes, sir.

Q. What did he do with that money?

A. He gave the most of it to me for the support of the family.

Q. What did you do with it?

A. Well, I paid grocery bills and house rent and used it for such things as is usually needed in a large family.

Q. About how much annually, how much a year did you spend on the family while he was alive?

A. Well, I would say in the neighborhood of \$1300.00 to \$1500.00.

Q. What was the real average annually that you were expending in support of the family out of the money that he gave you?

A. Well, as near as I could say it would be about \$1300.00

Q. Now, did you expend that money for the benefit of all these children that I have mentioned besides yourself?

A. Yes, sir, I did, on the children and myself.

Q. I will ask you if you can remember about in what proportion whether you could divide it up so as to tell approximately about how much you spent for each one?

By Mr. Gamble:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the witness:

A. Well, I could not say exactly—

By Jno. C. Moore:

Q. You have studied that subject some lately, have you?

A. Yes, sir, I have tried to figure out about what was spent on each one for clothing and such like.

Q. Did you take into consideration in making that estimate the groceries that were bought?

A. Yes, sir, I took in groceries, house rent, clothing and such things as it takes for the family.

Q. Did you take into consideration telephone bills?

A. Yes, sir.

Q. And gas?

A. Yes, sir.

Q. Water rent and taxes on property and the cost of clothing?

A. Yes, sir.

Q. And school books?

A. Yes, sir.

Q. And beds and bedding?

A. Yes, sir.

Q. And tables, chairs, queensware, cups, saucers, knives, forks and supplies for the household generally?

A. Yes, sir, I did, because I was the one that bought all those things.

Q. Now, Mrs. Turner, as near as you can determine from the difference of your situation and the difference of the situation of the children, their ages, their needs, etc., about how much do you believe you have expended a week for yourself?

By Mr. Gamble.

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

The Supreme Court of the United States has held under this Federal Statute that there must be a recovery for the individual member. Objection over-ruled; exception allowed.

By Mr. Gamble:

Exception.

By the Court:

I confess I don't see the necessity of it under our Statute.

By Jno. C. Moore:

There is not under our Statute, but under the decision of the Supreme Court of the Unit-

ed States in the case of Michigan Central Railway Company against Vreeland, 227, U. S. and the American Railroad Company vs. Deitrickson, 227 U. S.

By the Court:

Do they hold that a state court is bound to make that distribution?

By Jno. C. Moore:

They hold that the jury must make the distribution.

By the Court:

Go ahead.

By Jno. C. Moore:

Q. About what was your weekly expenditure on yourself?

By the witness:

A. About \$6.75 per week; that includes everything.

Q. That includes your clothing and garments of all characters?

A. Yes, sir.

Q. Did that include your insurance dues?

A. Yes, sir, it does.

Q. And all character of expenses for yourself?

A. Yes, sir.

Q. You say Vera is about seventeen years old?

A. She will be next January.

Q. What do you consider that you have expended on her?

By Mr. Gamble:

We object as incompetent irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the witness:

A. It costs as much for Vera as for myself.

By Jno. C. Moore:

Q. In estimating for each of the children you have considered doctor bills along with everything else?

A. Yes, sir, doctors and medicine, school books and things too numerous to mention.

Q. What about these expenses, as near as you can recall, that you have made weekly for Mary?

By Mr. Gamble:

We object as incompetent, irrelevant and immaterial.

By the Court: "Overruled."

By Mr. Gamble: "Exception."

By the witness:

A. \$3.50 a week.

By Jno. C. Moore:

Q. What do you say as to Mary?

A. About \$3.50 a week.

Q. And what about Dorothy?

A. Well, I put hers at \$2.80 a week.

Q. And what about Willie?

A. \$2.50 per week.

Q. What about Bessie?

A. \$2.30 per week.

Q. And what about Austin, the baby?

A. \$2.00 a week.

By Jno. C. Moore:

That is all.

#### CROSS EXAMINATION.

By Mr. Gamble:

Q. Mrs. Turner you say your husband's salary was on an average of \$125.00 per month?

By the witness:

A. Yes, sir.

Q. From whom did he draw his salary?

A. He drew it from the Rock Island Railway Company and then he worked for the Enid Ice and Fuel Company, the white mill, Grubb and Purmort and the Arctic Ice Company.

Q. Do you know how much salary he drew from the Rock Island Railway Company?

A. I have part of his vouchers and also the expenses of the men, but for most of the men he kept a little book and kept his accounts in that.

Q. Did he have any stated salary with the railway company?

A. No, sir, he handled coal by the ton.

Q. Some months it was greater than others?

A. It depended on what the tonnage was.

Q. Can you tell me how much it was for the month of June, 1912?

A. Do you mean what the coal voucher was?

Q. Yes, madam?

A. I don't know that I know exactly; that was paid after his death. (Examining paper.)

Q. Was it paid to you?

. No, sir, it was not paid to me directly. It was paid to Mr. Edmondson. He furnished the money to pay the bills and all the indebtedness, and he drew these vouchers.

Q. You don't know how much that was?

A. No, I have one voucher listed for June of \$138.00, but I don't know whether that was June, 1912, or the year before.

Q. Do you know whether or not he owed

any of his helpers for their services for the month of June?

A. No, sir, I don't think he did.

Q. Did he have helpers during the month of June, 1912?

A. I don't think he had over one man.

Q. He paid him though?

A. Yes, sir.

Q. And that would come out of this voucher?

A. He would either pay it out of his coal voucher or the extra work he did for the other parties. You see their work was cash and he generally used that to pay these men.

Q. In reaching your conclusion that he received so much money you have taken into consideration all the work he did?

A. Yes, sir.

Q. And the profits he realized from the work of other people?

A. Yes, sir; he always tabulated what he made for the coal, for the transfer work, for the cooerage of cars, for the Enid Ice and Fuel Company, Grubb and Purmort and the Arctic Ice Company; he would put down the earnings for all these and then subtract the cost of his labor.

Q. You have stated his average earnings, his profits and all that business?

A. His profits, yes, sir.

Q. You say in reaching your conclusions as to the disbursement of his property that you have taken into consideration the taxes on property?

A. We have no property; we always paid house rent up to the time he was killed.

Q. He worked under a contract did he not?

A. Yes, sir; but the transfer work he received that in a check from the Rock Island freight agent. That was not under any contract; his June check for his extra work in 1912 was \$72.28.

Q. How much of that did he pay out for labor?

A. He only had one man helping him.

Q. How much did he pay him?

A. \$2.00 a day.

Q. Did he work every day?

A. No; whenever he would need him he would call him; he didn't work straight time.

Q. You don't know how much of that \$72 was afterwards paid out for labor, do you, for the month of June?

A. No, he settled with the men himself, and it was just for the July labor that I settled for after his death. June had been paid.

Q. Do you know how much his May check was from the Rock Island in 1912?

A. No, sir, I could not tell you.

Q. Have you any idea?

A. No, I haven't the least idea; I can give you the vouchers for 1910 straight.

Q. From 1910 to 1912?

A. No, from 1910 to 1911, for the year; I have them here in a book. He covered these little books and kept his work in it and whenever one was full he threw it away.

Q. You have no record of the amount of money which he earned by his own labor and that of others during the year 1912?

A. No.

Q. Have you any record of the amount of



money he expended for labor during that year?

A. Not for 1912; he did most of his own work.

Q. How much money did he give you in June, 1912?

A. \$115.00.

Q. All at one time?

A. No, not at one time; he gave me the grocery bill and the lodge dues and meat bill.

Q. How much did he give you in May, 1912?

A. About \$115.000.

Q. Have you any record to show the receipt of that money by you from him?

A. I haven't all the receipts; the grocery bill we took these coupon books and destroyed them; I have house rent receipts and such as that.

Q. You don't know how much you, spent on yourself during those months?

A. No, I could not state exactly; I always bought all of our clothes for myself and children.

Q. The amounts you have stated are mere estimates of your expenditures?

A. Yes, sir.

By Mr. Gamble:

That is all.

WITNESS EXCUSED.

GEORGE E. WALLACE, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Plaintiff, testified as follows: to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. State your name?

By the witness:

A. George A. Wallace.

Q. Where do you live?

A. El Reno, Oklahoma.

Q. Are you in the service of the Chicago, Rock Island and Pacific Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Engineer.

Q. Were you in the service of the company on the 28th day of July, 1912?

A. Yes, sir.

Q. In what capacity?

A. As engineer.

Q. Do you remember coming into Enid? on that day?

A. Yes, sir.

Q. Where did you come from?

A. Caldwell, Kansas.

Q. Did you bring a train down?

A. Yes, sir.

Q. Were you the engineer on that engine that brought the train?

A. Yes, sir.

Q. What was the number of that engine?

A. No. 2113.

Q. I will ask you, Mr. Wallace, where was the destination you were going to at that time?

A. Our expectations were to go to El Reno, Oklahoma.

Q. That was the destination intended?

A. Yes, sir.

Q. Did you uncouple from the train when you reached the Enid yards and run off down to the south side of the yards and the south end of the switch yards?

A. Yes, sir, there was work done; I cannot recall the movemnts exactly.

Q. You went down there?

A. Yes, sir.

Q. Ho wmuch of the train went with you down there?

A. Well, the first switch that was made a portion of the train was put down on track number one.

Q. Did you push your engine and some cars up on to track two?

A. We used track two coming from the south end of the yard with cars back of the engine.

Q. How many cars?

A. Two.

Q. What kind of cars were they?

A. The car attached to the engine was a box car; the next car was a flat car.

Q. Did you have a tender attached to your engine?

A. Yes, sir.

#### CROSS EXAMINATION.

By W. H. Moore:

Q. When you came to the Enid yards you came in at the north end?

By the witness:

A. Yes, sir.

Q. And when you went with your engine to the south end of the yards what cars, if any did you take, if you remember?

A. I cannot recall the first work that was done.

Q. Where did you get the box car and the flat car that you were pushing as you came in on track number two?

A. It seems to me those cars were

switched out and held on to on account of being set-out cars enroute.

Q. When you started in on track number two, which way was the pilot of your engine?

A. The engine was headed south.

Q. Where were these cars, on which side of the engine?

A. To the north of the engine.

Q. Your engine then was backing as you came in on number two?

A. Yes, sir.

Q. The box car was next to the engine, then came the flat car?

A. Yes, sir.

Q. What, if anything, was on that flat car?

A. It was partly loaded with machinery.

Q. Who was your brakeman on that trip?

A. Portelle and Kendrick.

Q. As you started in on track two, what brakeman were on your train?

A. Portelle and Kendrick.

Q. Were both of them on your train when you started in the lead?

A. Yes, sir.

Q. Or did one of them get on later?

A. They were both on the car leaving the south end of track two.

Q. Can you tell approximately how far it is from the lead in on track two to the freight house?

A. No, sir, I could not give you the exact distance.

Q. As you came up track two what were you doing?

A. I was on my engine in the engineer's position.

Q. What is the engineer's position?

By Jno. C. Moore:

Plaintiff objects as not proper cross-examination. I confined my examination of this witness to a very brief matter, and he is their servant.

By the Court:

Sustained as not proper cross-examination. Anything you want to examine him about as to the character of the train you are at liberty to do so. Objection sustained.

By W. H. Moore: "Exception."

By W. H. Moore:

Under the ruling of the Court, I have nothing further to ask the witness at this time.

WITNESS EXCUSED.

George W. Bond, a witness, of lawful age, having been first duly sworn by the Clerk, and being recalled as a witness upon the part of plaintiff, testified as follows to-wit:

EXAMINATION BY JOHN C. MOORE.

By the court:

It cropped out that those coal tickets were simply memorandums, and is there any proof that after they were sent in that they were preserved?

By John C. Moore:

Possibly not that they were preserved, although they were files of the Company.

By W. H. Moore:

They are temporary records and we cannot get them.

By John C. Moore:

Q. I will ask you, Mr. Bond, if on the evening that Mr. Turner was killed, after his being killed, if you looked into the coal ticket boxes?

By the witness, Geo. W. Bond:

A. Yes, sir.

Q. Did you see any tickets there?

A. Yes, sir; there was as many as two tickets in the north end box. I never looked into but one box.

Q. You had been working for Turner shoveling coal?

A. Yes, sir.

Q. Do you know how much coal a day was being taken away from there by engines?

A. I suppose about 75 or 80 tons a day.

Q. I will ask you to state the average?

By W. H. Moore:

We object as incompetent, irrelevant and immaterial; the question is, how much was taken on this day, and it being Sunday, there was no engines working there, and we ask that the last answer be withdrawn.

By the Court:

It is withdrawn.

(Thereupon, by request of counsel, the above question, viz: "Do you know how much coal a day was being taken away from there by engines?" was read to the witness by the Reporter.)

By the Witness:

A. I dont' know for certain how much they did use per day, but I judge 75 or 80 tons a day.

My W. H. Moore:

Defendant asks that that answer be stricken.

By the Court:

Yes, sir, that is withdrawn from the jury.

By John C. Moore:

Q. You do know it was not less than 70 or 80 tons a day, do you not?

By W. H. Moore:

Defendant objects as incompetent and irrelevant and leading.

By the Court:

Sustained.

By Jno. C. Moore:

Q. You yourself didn't have charge of the delivery of coal to engines, did you?

By the witness:

A. I did when Mr. Turner was not there.

Q. During the time you did have charge, how many tons were taken daily?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By W. H. Moore: "Exception."

By the witness:

A. I don't know exactly how to tell that, but I suppose it was about 75 or 80 tons a day.

By W. H. Moore:

Defendant moves that the answer be stricken, if your honor please.

By the Court:

The answer will be stricken.

By the Court:

Q. State your best judgment as to the amount taken a day when you were at work?

By the witness:

A. About seventy-five or eighty tons a day.

Q. Do you know how much was taken on this Sunday?

No, sir.

By Jno. C. Moore:

Q. Seventy-five or eighty tons a day was an average, was it not?

A. That is what I judge it to be, about an average.

Q. Now I will ask you about how much on an average an engine took from the coal chutes?

A. Well, it took from two to eight tons; some of them two and some of them as high as eight tons.

Q. What was the average, about?

A. I suppose they averaged about five tons.

By Jno. C. Moore:

That is all.

By W. H. Moore:

The sheets that we turned over to Mr. Moore on your honor's order are not here, and we will excuse the witness until they are here and with the right to re-call him.

WITNESS EXCUSED.

A. P. Bond, a witness, of lawful age, being first duly sworn by the Clerk of the Court and being called as a witness upon the part of Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. You may state your name?

By the Witness:

A. A. P. Bond.

Q. Are you the plaintiff in this suit?

A. Yes, sir.

Q. The administrator of the estate of William L. Turner, deceased?

A. Yes, sir.

Q. What has been your occupation for several years past?



A. Well, for the last twelve years my occupation has been railroading, principally, for the Rock Island Company.

Q. In your experience as a railroad man have you discovered the length of an engine, a number 2100, that is used by the Rock Island Railroad with its cars?

A. Yes, I have looked at many of them.

Q. Have you discovered the length of such engines?

A. Well, I have it pretty well fixed in my mind by observation.

Q. Do you know what the length of a 2100 engine is?

A. Not exactly.

Q. Do you know very closely?

A. I think I do.

Q. You may state what the length of a 2100 engine is with its tender?

A. Well, take a 2100 with the pilot, the engine and the tender will cover between seventy-five and eighty feet to the best of my judgment.

Q. On what do you base your judgment as to that length?

A. Well, I have turned a great many engines of all lengths and sizes on our turn-table at Chickasha, and it is 75 feet in length and I have observed it took the entire length of the turn table to turn an engine.

Q. I will ask you if you know what the length of standard box cars are?

A. Yes, sir, I think so.

Q. What is the length?

A. The standard runs from 34 to 40 feet; including 34, 36 and 38 and 40, and 40 is the standard.

Q. Do you know what is the length of flat cars?

A. Well, they run the same way.

Q. What is the distance between the two rails of a track, if you know?

A. Yes, sir, I know exactly.

Q. What is it?

A. Four feet, 8 1-2 inches.

By Jno. C. Moore:

Take the witness.

My W. H. Moore:

No questions.

By the Court:

Q. What is the distance between two side tracks, the distance between the rails?

By the witness:

A. I could not tell you exactly.

By Jno. C. Moore:

Q. Are the distances uniform?

A. Oh, yes.

Q. I don't mean the distance in the track; when there is two tracks side by side are the distances between them always uniform?

A. Certainly.

Q. Aren't some tracks sometimes laid farther away from other tracks?

A. Yes, occasionally, but in switch yards the distance of what is called the clear between the tracks is uniform.

Q. Do you know that distance?

A. Not exactly.

Q. It is a good deal wider than the distance between the rails of a track?

A. Yes, sir.

Q. It is so two trains can pass and still leave room enough for a person to stand between them?

A. Yes, sir.

By Jno. C. Moore:

That is all.

WITNESS EXCUSED.

BY JOHN C. MOORE:

"THE PLAINTIFF RESTS."

By W. H. Moore:

I want to cross-examine the witness, George W. Bond before I re-interpose my demurrer, and I cannot do it without those papers in the possession of Colonel Moore.

By Jno. C. Moore:

I will go and get them.

(Here Jno. C. Moore leaves court room for a few minutes and returns with certain papers demanded.)

George W. Bond, a witness, of lawful age, being first duly sworn and examined, and being recalled for further cross examination, testified as follows, to-wit:

CROSS-EXAMINATION BY W. H. MOORE.

Q. Mr. Bond, Mr. Turner was killed on Sunday, the 28th day July, 1912, do you recollect what you were doing the day before, on Saturday?

By the witness:

A. Yes, sir.

Q. What were you doing?

A. I was out threshing wheat with a threshing machine.

Q. How long had you been out with a threshing machine?

A. Pretty near four weeks.

Q. When did you come back?

A. Saturday evening.

Q. What were you doing Sunday?

A. I was up around town here doing nothing.

Q. Were you down about the coal chutes at all on Sunday?

A. No, sir, only I was down there that evening.

Q. After Mr. Turner was killed?

A. Yes, sir.

Q. What was your purpose in going down there then?

A. I heard them take Charlie Nelson's statement about what Turner told him about the tickets, and I thinks I would look in the box and I looked and there was as much as two tickets in that box.

Q. You didn't look in the others—what time of day was that?

A. It was after they took Mr. Turner away.

Q. It was still day-light?

A. Yes, sir.

Q. What did you do on Monday?

A. I went to shoveling coal; Nelson took the chutes.

Q. Do you remember how much coal you handled on Monday?

A. No, sir.

Q. How many cars did you shovel that day?

A. I didn't shovel e'er a one.

Q. How many tons?

A. I generally averaged about twenty-five tons a day.

Q. What did you average that day?

A. I don't remember.

Q. How were you shoveling this coal, from the car into the chutes?

A. Yes, sir.

Q. How many cars was there at the chutes for unloading on that Monday?

A. I think there was two.

Q. How much was in the chutes?

A. I could not tell you exactly; I never counted it up.

Q. Then or something like four weeks before Mr. Turner was killed up until after his death you knew nothing about what was going on in the yards here in Enid?

A. No, sir.

Q. About that time were they using a good many oil burners?

A. I think they were using quite a few.

Q. During the time they were using oil burners you handled less coal?

A. Yes, sir.

Q. For a time when they were using so many oil burners the amount of coal at the chutes dropped to nearly nothing?

A. Some days it would and some days it was a lot.

Q. Some days it would run down to as low as four tons?

A. I never knew of that.

Q. Did you ever know of it dropping down to that?

A. I never knew a day but what they pulled more coal than that.

Q. What was the number of the switcher, do you recollect?

A. I don't believe I can tell you.

Q. So all of your testimony in regard to the handling of coal there at the chutes was at a time either four weeks before Mr. Turner's death or after his death?

A. Yes, sir, that is all. I asked them a month's lay-off to go with the threshing machine.

RE-DIRECT EXAMINATION.

BY JNO. C. MOORE.

Q. Who was Nelson talking to?

By the witness:

A. I suppose to the railroad men; I don't know who it was.

Q. Were they taking his statement?

A. Yes, sir, they asked him certain questions.

Q. They were taking it for the Railroad Company?

By W. H. Moore:

We object as incompetent, irrelevant and immaterial.

By the Court:

My recollection is that was a voluntary answer on the part of the witness.

By Jno. C. Moore:

He stated it was because Mr. Nelson had said Turner had gone to the coal chutes for the tickets, and I was aiming to show that he made the statement to the railroad officials.

By W. H. Moore:

That came out purely voluntarily.

By the Court:

Sustained.

By John C. Moore:

Q. Who was Nelson talking to?

By the witness:

A. I don't know his name.

Q. Would you know him if you would see him now?

A. I don't know that I would.

Q. I will ask you if it was the Conductor of the train that engine 2113 was pulling?

By W. H. Moore:

We object as incompetent, irrelevant and immaterial.

By the Court:

You would have to show first that he knew who the Conductor was.

By the Court:

Q. Did you know who this was doing that?

By the witness:

A. No, sir, I didn't know him.

By Jno. C. Moore:

Q. Do you know who he was representing in doing that?

By the Witness:

A. The Rock Island I suppose.

By the Court:

Don't state that; that is stricken out.

By the witness:

A. I didn't know exactly.

By Jno. C. Moore:

Q. Couldn't you tell from the conversation who he was representing?

By W. H. Moore:

He says he don't know, and we object.

By the Court:

Sustained.

By Jno. C. Moore:

That is all.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

AFTERNOON SESSION, MONDAY, DE-  
CEMBER 1, 1913.

Thereupon, the District Court of Garfield

County, Oklahoma, convened at the hour of 1:30 o'clock, p. m., of this day, viz., Monday, December 1, 1913, with the Honorable James W. Steen sitting as Judge of said Court, and the officers of the court and the parties to this cause present, as aforesaid. The jury sworn to try the issues in this cause is present in a body in the jury box, and all the jurors are admitted to be present by counsel for plaintiff and defendant.

Thereupon, the trial of this cause is resumed and the following proceedings had, viz:

N. E. Crumpacker, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By Mr. Gamble:

Q. What is your name?

By the Witness:

A. N. E. Crumpacker.

Q. You live here in Enid?

A. Yes, sir.

Q. Were you living here in July, 1912?

A. Yes, sir.

Q. Did you know W. L. Turner?

A. Yes, sir.

Q. What business were you engaged in in July, 1912?

A. Manufacturing ice and ice cream.

Q. Under what firm name?

A. The Enid Ice and Fuel Company.

Q. You have a plant in Enid?

A. Yes, sir.

Q. In the operation of that plant do you use coal?

A. Yes, sir.



Q. Did you at that time?

A. Yes, sir.

Q. Received it in car loads?

A. Yes, sir.

Q. Who unloaded that coal for you?

A. Mr. Turner had the contract with the company at that time.

— Q. Was that contract written or verbal?

A. Verbal.

Q. Do you remember seeing Mr. Turner on July 28th, the day of his death?

A. Yes, sir.

Q. Was he engaged in any work for you or your company under that contract on that day?

By John C. Moore:

We object as incompetent, irrelevant and immaterial, leading.

By the Court:

Over-ruled as to everything except it being leading.

By Mr. Gamble:

Q. What was he doing at the time you saw him?

By the witness:

A. He was in our office at the time I saw him.

Q. What was he doing there?

A. He was conversing with Mr. Jackson and myself.

Q. What was that conversation about?

By John C. Moore: "We object as immaterial."

By the Court: "Over-ruled; just state what it was about."

By the witness:

A. I think it was about Mr. Jackson unloading a car load of coal for him.

By Mr. Gamble:

Q. For whom?

A. For himself. They were simply jesting; that is all.

Q. Had he unloaded any coal for you on that day?

A. I don't remember; I would not say whether he did or not. According to the best of my recollection I think there was a car at the coal bin at that time.

Q. You say he unloaded all the coal for your Company?

A. He and his subordinates did.

By Mr. Gamble: "That is all."

CROSS EXAMINATION.

By John C. Moore:

Q. You don't remember that he unloaded any coal for you that day?

By the witness:

A. I could not say positively.

Q. I will ask you if he didn't unload your coal at nights?

A. Some of it.

Q. Didn't he nearly always unload it at night?

A. I cannot say that he did.

Q. Didn't he come to consult you as to when the car should be set in for unloading purposes?

A. He did at times, yes, sir.

Q. In fact, that was the usual way?

A. If the railroad didn't put them in promptly he did sometimes.

Q. Didn't he arrange with you to have

the coal set in so after his hours of work for the railroad company he could unload your coal?

A. Yes, sir; sometimes.

Q. The most of your coal was unloaded by him at night, wasn't it?

A. I don't know whether the most of it was or not; I never paid much attention to that.

Q. This coal he unloaded for you was shipped in to you by the Rock Island?

A. Yes, sir.

Q. Where were you in the habit of purchasing coal?

By Mr. Gamble:

We object as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Exception."

By the witness:

A. We purchased in different places in the Oklahoma fields.

By John C. Moore:

Q. Did you purchase any in Arkansas?

By Mr. Gamble:

We object as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled."

By Mr. Gamble: "Defendant excepts."

By the witness:

A. Yes, we purchased some coal in Arkansas.

By Jno. C. Moore:

Q. He unloaded that for you?

A. Yes, sir.

Q. You purchased coal in Kansas?

A. I think on one occasion.

Q. He unloaded that for you?

A. Yes, sir, he or his subordinates.

W. M. Hutchinson, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being re-called as a witness upon the part of defendant, testified as follows, viz:

DIRECT EXAMINATION.

By Mr. Gamble:

Q. State your name?

By the witness:

A. W. M. Hutchinson.

Q. You have been on the witness stand in this case before?

A. Yes, sir.

Q. Did you see W. L. Turner on July 28th, 1912, the day of his death?

A. Yes, sir.

Q. Where were you when you first saw him?

A. I was on the cinder pile at the White Mill.

Q. At the Enid Mill and Elevator Company?

A. Yes, sir.

Q. In what capacity?

A. Well, I was supposed to be watchman on Sunday, and to clean up around the mill and haul away ashes.

Q. You were foreman for your company there?

A. Yes, sir.

Q. Where were you when you first saw Turner?

A. I was standing on top of the cinder pile.

Q. Where was he?

A. He was coming walking towards me.

Q. Did he come up to where you were?

A. Yes, sir.

Q. What transpired there immediately after he came up to where you were?

A. He walked up and spoke to me and asked me if I thought I would have enough coal to run me until Monday night.

Q. What did he mean by that?

A. He wanted to know if we had enough coal for the boiler room.

By John C. Moore:

Unless the witness knows what he meant by that we object to it.

By the Court:

You didn't get the objection in in time.

By Mr. Gamble:

Q. Go ahead. Did Mr. Turner unload coal for the Enid Mill and Elevator Company?

By the witness:

A. Yes, sir.

Q. Did he have a contract to do that?

A. Well, sir, I guess he had.

Q. Did he unload all their coal?

A. Yes, sir, he practically unloaded it all.

Q. Was he handling coal for them on that afternoon?

A. Well, I could not say as to that; I guess he must have been, I don't know; I could not say.

#### CROSS EXAMINATION.

By Jno. C. Moore:

Q. Then you say he must have been unloading some coal off the ground for the mill that afternoon?

By the witness:

A. He was picking up coal.

Q. Well, he was pitching it from the ground into the car. Now, I will ask you if it was in regard to that particular car of coal he was asking you about, when he asked if you would have enough to run until Monday night?

A. Yes, sir.

Q. When he unloaded coal for your Company he did it at night did he not?

A. Yes, sir, practically all at night.

Q. He would go to see you when you would need coal and arrange with Mr. Wagner to have it set in for his accommodation at night, is that true?

A. Yes, sir.

Q. That is, after his hours of labor were done for the day with the Rock Island road?

A. Yes, sir.

Q. Then he simply came to you for an arrangement about setting in the coal?

A. He came to find out if I would have enough to run me until Monday night.

Q. Now, I will ask you if it was while you were talking about that that the train 24 whistled?

By Mr. Gamble:

We object as incompetent, irrelevant and not proper cross-examination.

By the Court: "Over-ruled."

By Mr. Gamble: "Defendant excepts."

By the witness:

A. Yes, sir.

By John C. Moore:

Q. And when followed right on the other conversation that you have detailed before?

A. Yes, sir.

By John C. Moore:

That is all.

RE-DIRECT EXAMINATION.

By Mr. Gamble:

Q. You stated he was picking up a car of coal that day?

By the witness:

A. It was storage coal, yes.

Q. Whose coal was it?

A. It belonged to the mill company.

Q. He was picking it up for the mill?

A. Yes, sir.

By Mr. Gamble:

That is all.

WITNESS EXCUSED.

Charles Jackson, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore:

Q. State your name?

By the witness:

A. Charles Jackson.

Q. Where do you live?

A. Lincoln, Nebraska.

Q. How long have you been living there?

A. About eight months.

Q. Where were you living on the 28th day of July, 1912?

A. Enid, Oklahoma.

Q. What was your business at that time?

A. Assistant Ice Cream Maker for the Enid Ice and Fuel Company.

Q. Were you acquainted with W. L. Turner?

A. I was.

Q. Do you remember the occasion of his being killed in the yard at Enid?

A. Yes, sir.

Q. Had you seen Mr. Turner that day?

A. I had.

Q. When and where?

A. In the plant of the Enid Ice and Fuel Company.

Q. What time of day was it?

A. Approximately about five o'clock in the afternoon.

Q. Did you have any conversation with him on that day in regard to loading coal?

A. I did.

Q. What was the substance of that conversation?

A. He was loading a car of coal for the Enid Mill and Elevator and it was along in the evening he came through the plant and wanted to employ my brother and me to help him finish it up.

Q. Where was that car he was loading for the Enid Mill and Elevator Company?

A. About half way between the mill and the Texas Oil Company.

Q. How long was Mr. Turner about the plant at the time you had this conversation?

A. I think about half an hour.

Q. How long after he left there did you hear of his death?

A. Well, about ten or fifteen minutes.

Q. Did you go over to where his body was?

A. I did.

Q. Where with reference to the freight house did you find the body?

A. Well, it was to the best of my recollection, right east of the north end, somewhere along there.



Q. About opposite the north end of the depot?

A. Yes.

Q. When Mr. Turner left, what, if anything, did he say in regard to where he was going?

A. I think he said something—

By John C. Moore:

Wait! I object because it is immaterial and because it is calling for the statements of a man at a time when it is not proper *res gesta*.

By the Court:

They have a right to testify what he said; over-ruled.

By Jno. C. Moore:

If your honor please, William Turner's cause of action would have been for his injury, and we are not bound by these statements.

By the Court:

Give an authority on that.

By Jno. C. Moore:

Yes, sir, the 228th U. S.

By the Court:

I would like to look at it; there is no question but that they have a cause of action on account of his death, but I don't think that takes it out of the rule; if you have an authority saying that is incompetent, of course, I will follow it.

By Jno. C. Moore:

I would have to go and get the 133d and 134th Pacific.

By the Court:

Well, I will let it in; but I don't understand the law to be that way, Colonel; I am not egotistical about it, though, and would change my mind if you convinced me otherwise.

Objection over-ruled; exception allowed.

By the witness:

A. I think he said he was going to supper, but I won't be sure.

By W. H. Moore:

Q. What time was that?

A. About five o'clock; possibly a little after five.

Q. This conversation, you say, took place at the Enid Ice and Fuel Company? (Exhibiting blue print Exhibit One to witness).

A. It did.

Q. What part of their plant there?

A. (Indicating on Ex. One) It was in the north-east corner of the ice cream department.

Q. And the place you saw his body after you heard of his death was in what direction from that?

A. South-west.

Q. Was the point where you found him in line with the road he would go to go home?

A. Well, straight through, I suppose it was, but I don't know the exact road he would take.

Q. It was in the direction of his home?

A. Yes.

By W. H. Moore: "That is all."

CROSS EXAMINATION.

By Jno. C. Moore:

Q. Were you sworn before in this case when the cause was pending in the United States District Court; you were were you not?

By the witness.

A. I was; I think so, I am not sure.

Q. You were sworn at Lincoln, Nebraska?

A. Yes, sir.

Q. I will ask you if in the testimony you gave at Lincoln, Nebraska you stated that Mr.

Turner came into your place at about five o'clock in the afternoon of that day?

A. I think so.

Q. And didn't you state he remained there from twenty to twenty-five minutes?

A. I don't remember that I said the exact time, but something like that.

Q. In point of fact he did remain there for 20 or 25 minutes?

A. Yes, something like that.

Q. When he left the ice plant did he go out of the east door?

A. No, sir.

Q. What door did he go out at?

A. The west door.

Q. That would be by the side of the railroad track?

A. Yes, sir.

Q. Now then I will ask you if the north part of the Enid Ice and Fuel Company isn't what they call the pop room?

A. It is.

Q. That is where you bottle pop?

A. I guess so.

Q. And the next room south of that is the ice cream room?

A. It is.

Q. It is in that room where you had the conversation?

A. Yes, sir.

Q. Is there a door leading from the ice cream room to the railroad tracks?

A. No, sir.

Q. Then he went out of the east door of the ice cream room?

A. No, sir.

Q. Which door did he go out at?

A. The south door.

Q. Awhile ago you said the west door?

A. You asked me about the west door of the plant.

Q. Did he go through a door in the ice cream room south into another part of the building?

A. He did.

Q. What is that?

A. A hall-way.

Q. That runs clear through east and west?

A. It does.

Q. Did he close the door after him.

A. He did not.

Q. Did you see which way he turned?

A. Yes, sir.

Q. You didn't testify to this in the examination at Lincoln, Nebraska?

A. I was not asked those questions.

Q. Answer my question, Did you testify to that?

By W. H. Moore:

He has answered.

By John C. Moore:

Q. Did you see him go out of the west door?

By the witness:

A. I did not.

Q. It is only an inference then?

A. I saw him go down the hall toward the west door.

Q. That is all you know about it?

A. Yes, sir.

Q. He might have turned around to go back east?

A. I think not because I was in the hall.

Q. And still you didn't see him go out of the west door?

A. I did not.

Q. How far south of the pop room door is that door which leads east out of that hall?

A. About fifty or sixty feet.

Q. Is there a door leading out of the ice cream room to the east?

A. There is.

Q. How far is that door south of the pop room door?

A. Well, I don't know the exact feet, but about four feet north of the hall.

Q. When he would go out of that east door, either of the hall or of the pop room, he would then be immediately in sight of the cinder pile of the Enid Mill and Elevator Company would he not?

A. He would.

Q. I will ask you if it is not a fact that the freight house is practically on a straight line between the ice plant and his home?

A. I don't know exactly where his home is at.

Q. The freight house is in a southwest direction from the ice plant is it not?

A. Yes.

Q. And his home was in a south-west direction from the ice plant?

A. I think so, yes.

Q. And the freight depot was between him home and the ice plant?

A. I think so.

Q. Now, you say it was fifteen or twenty minutes after he left the pop room before you heard he was killed?

A. I said ten or fifteen minutes.

Q. And you went to his body?

A. I didn't go right up to it; I went probably fifteen feet from it.

Q. I will ask you if you saw Will Hutchinson there?

A. I don't remember.

Q. Did you go to the cars that were standing there north of his body?

A. I walked by them.

Q. Which way did you walk when you walked by them?

A. South.

Q. They were standing south of his body at that time?

A. No, sir.

Q. Which way were they standing?

A. North of his body.

Q. And you went by those cars in going to his body?

A. I did, yes, sir.

Q. How did you get through from the pop room?

A. I didn't go out of the pop room.

Q. How did you get out of that room?

A. I went out of the west door of the ice part.

By Jno. C. Moore:

That is all.

WITNESS EXCUSED.

J. A. Bowman, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore:

Q. State your name?

By the witness:

A. J. A. Bowman.

Q. Where do you live?

A. At Utica, Illinois.

Q. By what company are you employed?

A. By the Rock Island.

Q. How long have you been in the employ of the Rock Island?

A. All together about eleven or twelve years.

Q. In what capacity?

A. Most o the time a station agent and yard master.

Q. In what capacity were you employed on the 28th of July, 1912?

A. As agent and yard master at Enid.

Q. Were you acquainted with W. L. Turner?

A. Yes, sir.

Q. Do you remember the incident of his death?

A. Yes, sir.

Q. Immediately prior to his death, do you know of any contracts he had with the Rock Island Railroad Company for work at Enid?

A. Yes, sir.

Q. In a general way, what were they?

A. We had a contract for him to take care of the coal chute and for the cooperage of our cars.

Q. Did he do any work aside from that in transferring freight?

A. Yes, sir, but not under contract.

Q. How was he employed to do that work?

A. He was employed the same as we would employ any other extra labor. We are allowed at Enid an extra laborer and whenever

work shows up to require it we have authority to employ an extra man to take care of that work, and we would call Mr. Turner to do it when he had time.

Q. In what way did you pay him?

A. At times he was paid by voucher and at times he was carried on the labor roll.

Q. At the time, July 28th, 1912, was he or not employed in this extra way that you speak of?

A. He was not.

Q. At the time of his death did he have any duties to perform except those covered by the two written contracts to which you refer?

A. He did not.

Q. Where were the cars,—when he could cooper cars, where was that work done?

A. At various places, depending on the condition of the yards. Depending on how many cars we had in the yards. As a rule the cars were placed on what we called the stock track, and on track number five, I believe it was.

Q. Look at this blue print (Handing Exhibit One to witness) and tell us which track you refer to as the stock track?

A. The fartherest track east,—south, of the depot, down near the stock pens. (Indicating on Exhibit One.)

Q. Are you able to say whether or not there were any cars being coopered in the yard on the 28th of July, at the time of Mr. Turner's death?

A. I could not say.

By W. H. Moore:

That is all.

#### CROSS EXAMINATION.

By John C. Moore:



Q. You were sworn and gave your testimony at Utica, Illinois, at the time this case was pending in the United States District Court for the Western District of Oklahoma?

By the witness:

A. I was sworn at Utica, Illinois; I could not say as to where the case was.

Q. I hand you Plaintiff's Exhibit B and ask you if your signature is attached to it?

A. I don't find it; no, sir.

Q. I hand you Exhibit A and ask you if your signature is attached to that contract?

A. Yes, sir.

Q. What is that contract commonly called; what are the duties under that contract?

By W. H. Moore:

We object; it appears to me that the contract will speak for itself.

By the Court: "Objection sustained."

By John C. Moore: "Exception.

By John C. Moore:

Q. I will ask you if Exhibit B or a copy of it was handed to you at Utica, Illinois, for examination?

By the witness:

A. I could not say.

Q. I will ask you if Mr. Gamble didn't submit for your examination a contract for unloading into the chutes and for picking up coal and for unloading coal to the stationery engines, and cord wood, cinders and sand?

A. Mr. Gamble handed me two contracts, and as I remember, one of them covered that.

Q. You testified in regard to the duties of Mr. Turner under this contract for unloading, did you not?

A. Yes, sir.

Q. I will ask you if you didn't testify that you knew of Mr. Turner unloading coal from the cars at Enid into the road and switch engines?

A. Yes, sir.

Q. You were asked if he was engaged in doing this kind of work when you first went to Enid?

A. I don't remember.

Q. Did you testify in answer to that question, "Yes, sir"?

A. I don't remember.

Q. I will ask you if in fact he was engaged in doing that sort of work when he first came to Enid?

A. Yes, sir.

By Mr. Curran:

We object; there is nothing here to contradict what he is testifying to here.

By the Court:

Sustained. There is nothing shown about when he came to Enid, how remote it was or anything about it.

By John C. Moore:

Q. I will ask you when you came to Enid?

By the witness:

A. On February 1st, 1912.

Q. Was Mr. Turner here in the service of the road at that time?

A. Mr. Turner was employed under contract at that time.

Q. He was performing services under that contract?

A. Yes, sir.

By the Court:

Is there any controversy about that?

By W. H. Moore.

Not a particle in the world.

By John C. Moore:

Q. Who was the owner of the coal he loaded into the chutes under that contract?

By the witness:

A. The Rock Island Railroad Company.

By Mr. Curran:

We object as incompetent and move to strike that out.

By the Court:

That answer is stricken out.

By John C. Moore:

Q. Was he working under your orders and directions here?

By the witness:

A. He was as far as his contract were concerned.

Q. Who had charge of the ordering of the cars placed to these chutes?

A. I did.

Q. Where did you get your orders from?

A. I made my own orders.

Q. Who gave you the information?

A. We had the information.

Q. From whom?

A. From our records at the office.

Q. When the coal was out on the chutes and when it was necessary to place coal on the chutes, whence did you get that information?

A. We had information from the coal reports.

Q. Who made those coal reports?

A. The Chief Clerk part of the time, and another time I think there was another clerk signed for the work.

Q. Didn't Mr. Turner communicate the fact about the coal on the chutes?

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A. He would possibly come to the station and say he had unloaded all the coal there was in the car and would possibly say he had no more coal in the chutes.

Q. Did you always look to him to inform you when it was necessary so that the coal belonging to the ice plant and the mill could be set in those places?

A. No, sir.

Q. From where did you get that information?

A. We had that information.

Q. It was an original proposition from you?

A. If we received a car of coal for the Enid Mill and Elevator Company we set it; we took a check of the yard each morning; if the track was full we would not, but if there was room for the car we set the car in.

Q. Who pointed out if you had any cars to cooper for grain?

A. The cars Mr. Turner was to cooper for grain we set on the stock track and track five; those cars were marked "O. K'd for grain."

Q. From whom did Mr. Turner get instructions about handling work performed by him?

A. Under his contract, from me.

Q. You directed him what to do?

A. Yes, either me or my Chief Clerk.

Q. So that he was under your supervision and control all the time?

A. In so far as the contracts were concerned, yes, sir.

Q. How did you happen to get that "in so far as his contracts were concerned," Mr. Bowman?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial.

By the Court:

I don't think that reprimand is necessary.

By John C. Moore:

Q. He performed his duties in accordance with what you directed him to do?

By the witness:

A. Yes, sir.

Q. I will ask you if all this coal he handled for the chutes if that was Rock Island coal?

A. Yes, sir.

By John C. Moore:

That is all.

#### RE-DIRECT EXAMINATION.

By W. H. Moore:

Q. If a car of Company coal was delivered into the Enid yard did you get any billing or record information in regard to that?

By the witness:

A. Yes, sir, the conductor either had a record way bill or a card way bill covering that coal.

Q. So when he left the car here he turned a record over to your office?

A. Yes, sir.

Q. That is all the information you needed in regard to it?

A. Yes, sir.

Q. When a car of coal was to be unloaded at the chutes, you would tell Turner to unload it?

A. Well, not exactly; if the car was in the chutes and the pockets were not full, Mr. Turner would unload the coal.

Q. Did you have anything to do with dir-

ecting him in detail as to how he performed the terms of his contract?

A. No, sir.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

George E. Wallace, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being re-called as a witness for the Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore:

Q. You are the same George Wallace who was on the witness stand yesterday?

By the witness:

A. Yes, sir.

Q. At that time you testified you were locomotive engineer for the Rock Island Railway Company?

A. Yes, sir.

Q. How long have you been in the railway service?

A. All together twenty-five years.

Q. How long have you been employed by the Rock Island railroad?

A. Twelve years.

Q. In what capacity?

A. As engineer.

Q. You testified you were the engineer on 2113 that killed Mr. Turner?

A. Yes, sir, I was.

Q. When you came into Enid that afternoon, I believe you testified yesterday, that you cut your engine and a part of your train loose and went to the south end of the yards?

A. Yes, sir.

Q. That you then backed down on track Number Two, north?

A. Yes, sir.

Q. And that you had at that time your engine, tender, a box car and the flat car loaded with machinery?

A. Yes, sir.

Q. Now, as you were backing down there what brakeman were on the train?

A. I had one brakeman on the flat car, that was the rear car, backing on track Two; and Brakeman Kendrick came across and got on the flat car also.

Q. About where with reference to the freight depot, if you know, did Mr. Kendrick get on the flat car?

A. Considerably south of the end of the freight depot.

Q. What position did Mr. Kendrick take on the car when he got on it?

A. He sat down on the side of the car on the west side of the car.

Q. That would be on your side of the engine as you were backing up?

A. Yes, sir.

Q. At what speed were you going, Mr. Wallace, as near as you can tell from the time Mr. Kendrick got on the car until you received a signal to stop, what was your speed in through there?

By Jno. C. Moore:

I object.

By W. H. Moore:

I will change it then.

Q. What was your speed up until the time you stopped?

By the witness:

A. Between eight and ten miles per hour.

Q. What, if any, signals did you receive as you were backing up there; tell the jury all

about the occurrence there up to the time you killed Mr. Turner; tell it in your own way?

A. We were backing down track two towards the north end of the yard; Brakeman Kendrick was with his side to me, facing the west, and could see the entire yard and all around. I was sitting in the cab window with the biggest portion of my body outside of the cab window, with my right hand inside to operate the engine, if necessary, watching where I was going and watching the brakeman.

Q. What was the first thing that you saw that attracted your attention?

A. I saw Brakeman Kendrick put his hand out like that (Indicating) and make a part movement to get on the car, and then turned around and gave me the same signal again. (Indicating twice violent stop signal) and when he did so I used the emergency brake.

Q. What is that? (Indicating as did witness.)

A. That is the violent stop signal.

Q. He gave it the second time?

A. Yes, sir.

Q. How close together did those two signals come?

A. The first signal he turned his head kind of away from me and then he made a half movement to get on the car, and then he gave it again and then he looked back.

Q. Now, was there any appreciable time between those two signals; did they follow each other almost instantly?

A. Almost instantly.

Q. What did you do when you got that signal?

A. I used my emergency brake.



Q. What is that?

A. The emergency brake is the heaviest braking power we have.

Q. How did you put on your emergency brake?

A. There is five positions to the brake valve, and the extra pull back is the emergency application.

Q. When you give it the emergency you have given it every pound of air you have got?

A. Yes, sir.

Q. What was there that you could have done to have stopped that engine after you got the signal that you didn't do?

A. There was nothing more for me to do; I had used the full maximum braking power.

Q. You had done all that could be done?

A. Yes, sir.

Q. Was that train equipped with air brakes?

A. Yes, sir.

Q. Do you know whether or not they were coupled up on the flat car and the box car?

A. Yes, sir; I know they were.

Q. After you applied the air, how far did your train travel before it stopped, approximately?

A. About 140 feet as near as I could judge.

Q. When your train stopped, then what did you do?

A. When we came to a full stop, Kendrick, after this accident occurred, he got off—when we stopped he was about opposite my cab window, he says "We ran over a man"; he says "There he is", and I saw a man on the track just a few feet ahead of the pilot, probably twelve feet, and we backed down then about two

and a half or three car lengths a way from there and I got off my engine and Kendrick and I went to the man.

Q. He was dead?

A. Yes, sir; I presume he was.

Q. And was badly mangled?

A. Yes, sir; his head was crushed and one leg cut off.

Q. Before you got this signal from Brakeman Kendrick, this violent stop signal, had you seen anything of any one on the track?

A. No, sir.

Q. Were you looking down the track on your side of the engine?

A. Yes, sir; all the time when I was moving.

Q. Do you know whether or not your bell was ringing as you went down?

A. Yes, sir; it was.

Q. Whereabouts is this valve that works the air on your engine?

By John C. Moore: "We object as immaterial."

By the Court: "Over-ruled."

By the witness:

A. The brake valve is in conjunction with the throttle, very handy, just about ten or twelve inches lower than the end of the throttle and a very handy place to use.

By W. H. Moore: "That is all."

#### CROSS EXAMINATION.

By John C. Moore:

Q. Then, Mr. Wallace, Mr. Turner had already been run over when you received the signal from Mr. Kendrick?

By W. H. Moore: "We object as improper cross-examination, the witness having said nothing of the kind."

By the Court:

Sustained; I don't think you have a right to assume that fact.

By John C. Moore:

Q. What was the total length of the train you were running at that time?

By the witness:

A. Those locomotives, I believe, are about——

Q. Well, do you know?

A. I never gave them a measurement—

Q. I will ask you if you had not run as far as 160 feet before you stopped?

A. No, sir.

Q. You think it was about 112 feet or 132 feet?

A. I didn't say so.

Q. How far did you say you had run before you had it stopped?

A. About 140 feet.

Q. You think you ran about 140 feet after you got the signal?

A. Yes, sir.

Q. Well, if your train was not 140 feet long, then you had run over Mr. Turner with the rear car or with the flat car before you got the signal, is that true?

By W. H. Moore:

Deefndant objects as argumentative to begin with, and not proper cross-examination.

By the Court:

Yes, it is argumentative. You can ask him about the length of the train and then make your conclusions to the jury, but I don't think you have a right to make an argument about it with the witness.

By Jno C. Moore:

Q. I will ask you if you had kept the bell

continuously ringing from the time that you left the main track?

By the witness:

A. Yes, sir, the bell was ringing when we left the main track.

Q. How many switches did you have to pass from the main track before you went on to Track Two?

A. That would be the third switch.

Q. At which switch was it Mr. Kendrick came to you and got on the flat car?

A. We were already on Track Two when he came across; we were over the switch.

Q. Did you stop after passing the switch?

A. No, sir.

Q. Did you stop after passing the switch on to the house track—that is, after passing over the switch from the main track?

A. I don't understand.

Q. When you left the main track to go on to the next track, did you stop for the closing of the switch?

A. No, sir.

Q. Where is it that you started to back?

A. We had put a number of cars, I am not certain on which track, either on the passing track or on number One; we then moved ahead over the switch leading on to that track and the switch was thrown and then we backed in on to number Two track.

Q. On what track were you when you began to back so as to get on to track two?

A. We would be on the lead.

Q. You came to a stop on the lead before backing?

A. Yes, sir.

Q. I will ask you if you gave any signal

for backing when you started away from the lead?

We object as incompetent, irrelevant and immaterial.

By W. H. Moore:

By the Court: "Let him answer."

By W. H. Moore: "Defendant excepts."

By the witness?

A. No, sir, I gave no signal to back up other than the ringing of the bell.

By John C. Moore:

Q. You gave no sound of the whistle?

A. No, sir.

Q. You didn't give three blasts—short blasts—of the whistle?

A. No, sir.

Q. I will ask you, before you struck Turner, if you gave two short blasts of the whistle?

By W. H. Moore.

We object as incompetent, irrelevant and immaterial.

By the Court: "Over-ruled; I don't see the materiality of it though."

By the Witness:

A. The bell was kept ringing; that was the only signal of movement.

By John C. Moore:

Q. You gave no blasts of the whistle?

A. No, sir; for the reason there was no crossing, either public or private crossing near.

Q. I will ask you if there was a passenger train passing you at that time?

A. Yes, sir.

Q. I understand you to say that you gave no signals with the whistle?

A. I didn't use the whistle.

Q. At no portion of that backing up?

A. No, sir.

Q. How many taps of the engine bell did you give before you began to back?

A. They were too numerous to count; the bell was constantly ringing.

Q. I am talking about the time you were standing on the track before you began to back?

A. I could not say.

Q. You don't remember that you gave any?

A. Yes, sir, I fully recollect that the Fireman was at his station ringing the bell when we started to move.

Q. No, I mean before you started to move?

By W. H. Moore:

If your honor please, we object to all of this and insist that it is entirely immaterial.

By the Court: "Let him answer."

By W. H. Moore: "Defendant excepts."

By the Witness:

A. I am not certain of the bell ringing while we were standing still.

By Jno. C. Moore:

Q. Did you give a signal of any kind to start to back?

A. I answered that question by saying that the bell was ringing.

Q. You don't say that that bell was rung before you commenced to back?

A. At the instant we started to move the bell was rung.

Q. But not long enough to give any individual notice that you were going to back?

A. The Fireman was ringing the bell.

Q. Now, Mr. Wallace, how did it happen that Mr. Kendrick was standing by the track

as you approached him with the engine backing up, did you see him get off the car?

By the witness:

A. I don't understand the question.

(Here the last question above was read to the witness by the Reporter.)

A. No, sir, I didn't see him get off the car.

Q. He was standing there, was he, by your side?

A. I didn't see him standing anywhere.

Q. Didn't you testify that as you came up with the engine he was standing at the side of the track and called to you and told you that you had killed a man?

A. That is when the accident occurred—he jumped off, I seen him jump off the car and turn towards me, but at the same time he was giving a signal to stop.

Q. Was that the first signal he had given you?

A. No, sir, before he left the car I received two signals from Brakeman Kendrick.

Q. You don't know and you cannot tell now whether you had passed over Turner at that time or not?

A. I didn't know the cause of the signals.

Q. You cannot state now whether you had struck Turner at that time or not?

A. I don't know.

Q. You don't know whether those signals were given to you before or after you struck Turner, do you?

A. I could not answer that, because, I did not see Turner at any time.

Q. So in point of time of striking Turner, you don't know when these signals were given, do you?

By W. H. Moore:

He said he didn't; this is useless repetition.

By the Court:

Yes, sir. Proceed.

By Jno. C. Moore:

Q. How far north of the body was it when you got your engine stopped?

By the witness:

A. I have answered that. About ten or twelve feet.

Q. When you stopped the engine and saw the body of Mr. Turner lying there on the track did you continue to see it until the first person came there?

A. Yes, sir, I believe I did.

Q. Who was that person?

A. Kendrick, the brakeman, and myself were the first to the body.

Q. Did the Conductor come?

A. Some time afterwards.

Q. I will ask you if Mr. Kendrick or yourself touched the body in any way?

A. No, sir.

Q. Did you see the Coroner, the man that came there to swear you?

A. Yes, sir.

Q. I will ask you if the body had been touched up to the time of that?

A. No, sir.

Q. Did you see the undertaker there?

A. Yes, sir.

Q. Had the body been touched up to the time the undertaker got there?

A. No, sir.

Q. It lay in the same position then as when you first passed over it?

A. Yes, sir.



By Jno. C. Moore: "That is all."

WITNESS EXCUSED.

J. G. Portelle, a witness, of lawful age, being first duly sworn by the Clerk of the Court and being called as a witness upon the part of Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore:

Q. State your name?

By the Witness:

A. J. G. Portelle.

Q. Where do you live?

A. Enid, Oklahoma.

Q. What is your business?

A. Brakeman for the Rock Island.

Q. How long have you been in the railroad service?

A. Eight years next June.

Q. How long have you been working for the Rock Island?

A. Eight years in June.

Q. Were you one of the brakemen on the train that ran over Mr. Turner in the yards?

A. Yes, sir.

Q. Did you see the occurrence?

A. Yes, sir.

Q. Tell the jury all about it, will you?

A. Well, we backed in on number two track to get a car; we had a flat car, a box car and the engine and we were backing up, and as we had started down number two track—we had cut off a cut-off of cars on the passing track and Mr. Kendrick rode the cut of cars down on the passing track—it must have been about eight cars—and we stopped and picked him up and he got on the end of this flat car—

Q. Did you stop dead still when you picked Kendrick up?

A. No, we must have been going two or three miles an hour when we picked Kendrick up, and we went on down—

Q. You have not told the jury where you were standing?

A. When Kendrick got on, I was on this side, and got about the center of the flat car; and Kendrick sat down on the flat car on the engineer's side on the north-west corner; we went on down and we saw Mr. Turner—it must have been two car lengths that I saw him—he was between tracks two and three facing the north and walking north; he was walking in a safe place then, and as we came on down he kind of angled over across number two track, the track we were coming down on; it must have been about a half car length, I judge, from us where he started to cross the track, and we both hollowed at him and give the engineer a stop signal.

Q. What did you do, if anything, towards giving a stop signal?

A. I walked to the right hand side to give the stop signal and Kendrick was in a better position to give it and he gave it, and I walked back on the car and kept hallowing to get him off the track, but he didn't get out; he was facing north and about that time we hit him and just before we hit him he turned to the left; I was standing right over him and he turned to the left and at that time the draw-bar hit him and killed him.

Q. At what speed were you going when he got upon the track in your judgment?

A. Well I judge we were going five to eight miles an hour; something like that.

Q. How far did the train run after Mr. Turner was struck?

A. Well I judge about two car lengths. No, after he was struck we had run over him with these two cars and possibly the engine was a half car length from him.

Q. What did you do after the car stopped?

A. As quick as we hit Mr. Turner I jumped off the flat car and went ahead to the engine and told them we had killed a man.

Q. On which side did you go up on?

A. On the engineer's side.

Q. Do you know what Mr. Kendrick did?

A. He was sitting on the car at the time and then he came up there too.

Q. Do you know whether or not that train was equipped with air brakes?

A. Yes, the air was coupled up on the flat car and the box car both.

Q. What do you mean by coupled up?

A. It was in service, connected with the engine.

Q. Was it working?

A. Yes, sir.

Q. After Mr. Turner started to angle across the track, when he started to leave the place between the two tracks, what if anything, was there that you could have done that you did not do to have prevented the injury?

By Jno. C. Moore: "We object as calling for an opinion of the witness."

By the Court: "Let him state what he did."

By the Witness:

A. No; there was nothing else to do only to hallow and get him out of the way and give stop signals; he didn't hear us hallow, I guess, and there was nothing else to be done.

By W. H. Moore:

That is all.

### CROSS EXAMINATION.

By John C. Moore:

Q. Did you hallow?

By the Witness:

A. Yes, sir; I hallowed as loud as I possibly could.

Q. When you hallowed, in what direction was Turner walking?

A. Well, he had angled across from this safe place where he was walking between the tracks up into Number Two track, and the hallowing was when he was in number two track.

Q. You hallowed while he was in the track?

A. Yes, sir; I and Kendrick both.

Q. Did you hallow before he had stepped over the west rail with his left foot?

A. Well, yes, before he was in danger at the end of the ties before he came to that.

Q. I am asking you if you hallowed before he stepped over the west rail with his left foot?

A. He was coming from the east side—

By Mr. Curran:

We object; counsel is assuming that this witness testified he stepped over the west rail and he has not done it.

(Here, at the request of counsel for plaintiff the last question above was read to the witness by the Reporter.)

By the witness:

A. He never did go over the west rail at all; he was hit in the center of the track.

By Jno. C. Moore:

Q. Which way was his face when he was hit?

A. He was facing north.

Q. Was he walking north?

A. Yes, sir, more north than any other way.

Q. He hadn't got to the west rail?

A. No, sir.

Q. Where were you at the time he was hit?

A. Right on the center of the car, right over him.

Q. Hadn't you been to the north-east corner of the car?

A. No, sir; I had been to the north-west corner.

Q. Who else was in the north-west corner?

A. Kendrick was sitting on the north-west corner.

Q. At the time he was hit were you in the center of the car?

A. Yes, sir.

Q. Over the draw-bar?

A. Yes, sir.

Q. Did you see where the draw-bar hit him?

A. Yes, sir.

Q. Where; show the jury?

A. Right in here. (Indicating near center of back.)

A. How high up?

A. Right in here? (Indicating just above hips.)

Q. That threw him on his face?

A. I could not tell which way he fell, because he went out of sight; he went forward though.

Q. And the car went right over him?

A. Yes, sir, the best I know; I was on top.

Q. When did you get off the car?

A. I jumped off about the time it ran over him or a little afterwards.

Q. Which side of the car did you jump off on?

A. On the engineer's side.

Q. You had to go to the other side to jump off?

A. Yes, sir.

Q. You left Kendrick on the car?

A. Yes, sir, he was sitting on the car.

Q. Did you walk anywhere?

A. I walked towards the engine and told him we had run over a man and then walked up to Mr. Turner.

Q. Did you walk towards the engine from where you jumped off.?

A. Yes, sir.

Q. How far did you walk?

A. I don't know how far I walked.

Q. Was the engine coming towards you?

A. Yes, sir. May be I walked half a car length.

Q. And then the engine came close enough so you could talk to Mr. Wallace?

A. Yes, sir.

Q. What did you say to Mr. Wallace?

A. I told him we had run over a man.

Q. Had the engine passed over the body then?

A. Yes, sir.

Q. Then you didn't walk at all towards the front of the train?

A. We were backing up then; that was the head end of the train.

Q. You went farther forward than where Mr. Turner's body lay?

A. No, sir, I went up to the body.

Q. And staid there until the engine came?

A. No, sir, I passed the engine before I got to the body; we were backing up.

Q. So, up to that time Mr. Wallace didn't know Mr. Turner was killed, did he?

A. I guess he did—I don't know whether he did or not; I told him we had run over a man.

Q. I will ask you how close you were to Mr. Turner when a signal was given to Mr. Wallace to stop.

A. Well, sir, I judge the first signal was about half a car length from him.

Q. That is the signal given to Wallace?

A. Yes, sir.

Q. How far were you from Mr. Turner when you hallowed for him to get out of the way?

A. We started to hallow at the same time we commenced giving the signal.

Q. Wasn't he walking leisurly along?

A. He was walking along unconcerned.

Q. He hadn't observed you, had he?

A. I don't know whether he had or not; I would think he would coming down there that way.

Q. He didn't show any signs of noticing your coming, did he?

A. No, sir, not by staying up in the track he never.

Q. He didn't do anything that indicated he knew you were coming?

A. He whirles around when we hallowed, just before he got hit.

Q. Which way did you say he turned?

A. He turned to the left.

Q. Was he hit near the center of the back or to the left of the center of the back?

A. Near the center of the back it looked to me .

Q. He turned because he heard the hallowing, didn't he?

By W. H. Moore:

We object as calling for a conclusion of the witness.

By the Court:

I don't see how he could tell whether he heard the hallowing or not. Sustained.

By Jno. C. Moore: "Exception."

By Jno. C. Moore:

Q. He actually did turn when he heard the hallow, didn't he?

By the witness:

A. We hallowed before that and he never turned.

Q. I didn't ask that; answer my question.

A. We were hallowing when he turned, yes, sir; we were hallowing before he turned and after he turned.

Q. How many times did you hallow?

A. I judge about four or five.

Q. How far from him were you when you first hallowed?

A. We were about a half car length when we commenced hallowing.



Q. How many times did Kendrick hallow?

A. I judge he hallowed about the same number of times I did.

Q. So between you both, you hallowed eight times?

A. Eight or ten times, yes, sir.

Q. How long after you commenced hallowing before he turned?

A. We had run the distance of about a half car length.

Q. At what rate of speed?

A. We were going five or eight miles an hour, I judge.

Q. How many steps did he take in that time?

A. Well, he possibly took eight or ten or twelve steps; something like that.

Q. How far is it across that track?

A. Well, sir, from where he was in danger, from one end of the ties to where he was hit, he was just half way, he probably made that in two or three steps and then he walked north.

Q. He was actually walking north in the center of the track when you hit him?

A. Yes, sir.

Q. With his face to the north?

A. Yes, sir.

Q. And when he turned which direction did he turn?

A. He turned to the left and looked back.

Q. How far did he turn?

A. Well, sir, he had just got his head around about the time it hit him.

Q. Did he turn any portion of his body around?

A. He might have moved his body a little bit; I noticed his head more than his body.

Q. Did you see his body after the train ran over him?

A. Yes, sir.

By Jno. C. Moore:

That is all.

**WITNESS EXCUSED.**

R. G. Kendrick, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

**DIRECT EXAMINATION.**

By W. H. Moore:

Q. State your name?

By the Witness:

A. R. G. Kendrick.

Q. What is your business?

A. Brakeman.

Q. Where do you live?

A. El Reno.

Q. By what company are you employed?

A. The Chicago, Rock Island and Pacific Railway Company.

Q. How long have you been in the employ of that Company?

A. Been braking for them six years, and was in the mechanical department about six years.

Q. What is your age?

A. Thirty-four.

Q. Were you one of the brakemen on the train that struck and killed Mr. Turner in Enid?

A. I was.

Q. Tell the jury all you know about that occurrence?

A. Well, we were backing down on this track that Mr. Turner was killed on, which was on Number Two; we come into the lead and I rode a cut of cars in on the passing track, and as he came down he slowed up and picked me up, the engineer did, and then he come on down and I noticed this man coming between the two tracks 2 and 3; he was safe on either side of where he was walking then.

Q. After you had ridden that cut-off of cars down on the passing track, then you went over and got on the string of cars connected with the engine?

A. Yes, sir.

Q. How many cars were on the engine?

A. We had a box car next to the engine and then a flat car with threshing machinery.

Q. When you got on the flat car was there anybody on there?

A. Yes, Brakeman Portelle.

Q. Where was he when you got on?

A. On the middle about the north end, and I got on the north-west corner and sat down.

Q. Where did you say you saw Mr. Turner then?

A. He was walking between tracks two and three in a safe place the first I seen of him.

Q. Go ahead and tell the jury all you know about it?

A. Well, we came on down the track and when we noticed him he was walking along like anybody ordinarily will, and the first thing I knew he jumped up and started to angle across the track; we were about fifteen or twenty feet from him then and Mr. Portelle and I both went to hallowing, and hallowed as loud as we

could, and the first thing I did was to give a stop signal.

Q. How?

A. This way; (Indicating violent stop signal with hands and arms) and we hallowed until the car struck him and passed over him.

Q. On which side of the train were you?

A. The engineer's side.

Q. How many stop signals did you give him?

A. I don't know; a man in that position would not remember everything that took place at that time.

Q. Was there any response to your stop signal?

A. Yes, sir.

Q. What was it?

A. He applied the air; of course, there was a little time from the time he took the signal; you have got to give him time to get the brakes.

Q. What happened when the air went on?

A. We stopped as quick as we could.

Q. In what position on the track was Mr. Turner when he was struck?

A. He was angling across and the draw-bar struck him; he was angling across, he was not going straight across.

Q. Did he make any response to the yells?

A. Not a thing in the world that I could see.

Q. Did he make any turn?

A. Just as the draw-bar struck him he turned his head.

Q. After the man was struck what did he do?

A. I don't know; the first thing I remem-

ber I jumped off the car and had my hat off, and then I walked towards the engine.

Q. You were considerably excited, were you?

A. Yes, sir.

Q. How fast in your judgment, was the train moving at the time you gave this stop signal to the engineer?

A. Between eight and ten miles an hour.

Q. After you saw Mr. Turner in a position of danger, what was there that you could have done that you did not do, if anything, to have saved him?

By Jno. C. Moore:

I object as calling for an opinion of the witness.

By the Court:

I am inclined to let him state.

By W. H. Moore.

Q. Was there anything else aside from what you did that you could have done to prevent that accident?

By the witness:

A. I don't think there was; the time was so short we done all we could do and that was to hallow at him.

Q. How far did the train move after Mr. Turner was struck?

A. There was two cars and the engine passed over him and about a car length from the pilot. I was kind of excited and didn't just notice how things stood around there.

Q. You were practically right there over him when he was struck?

A. Yes, practically.

Q. It was a very sad and a very distressing occurrence?

A. It was; yes, sir.

Q. How was that engine and those two cars equipped with air?

A. They had the regular air brake equipment, I think.

Q. Was the air brake coupled on the two cars?

A. Yes, sir.

Q. Was it working?

A. Yes, sir.

Q. You said when you gave the signal to the engineer he applied the air, could you feel the air come on?

A. Yes, sir.

Q. How prompt or otherwise was the response to your signal?

A. Well, he was very prompt to the signal; he reached over, I suppose, and pulled the brake valve back as far as it would go.

Q. You could feel the air come on?

A. Yes, sir.

Q. Did that come immediately or a long time after your signal?

A. No, it came immediately.

Q. On your signal?

A. Yes, sir.

By W. H. Moore: "That is all."

#### CROSS EXAMINATION.

By John C. Moore:

Q. You, in that crew, were what we call the rear brakeman?

By the witness:

A. Yes, sir.

Q. And in backing the train it is your duty to be on the rear car?

A. Yes, sir.

Q. Among other things it is your duty to

be constantly ready to signal the engineer or fireman?

A. Yes, sir.

Q. Who was the fireman that day?

A. Vic Reems.

Q. Mr. Portelle was on the rear end of that car with you?

A. Yes, sir.

Q. Did he have any duty to signal to the engineer or fireman?

A. He would, yes, sir.

Q. To which one?

A. To either one of them.

Q. If he was on the fireman's side it was his duty to signal to the fireman, while you should signal to the engineer?

A. He was in the middle of the car.

Q. Was he in his proper place?

A. Yes, sir.

Q. Can you tell me how many feet you were away from Mr. Turner when he entered on track two?

A. We were about fifteen or twenty feet.

Q. Do you think you could have been as much as 25 feet?

A. No, sir.

Q. What do you say the rate of speed was you were traveling?

A. Between eight and ten miles an hour.

Q. The first thing you did was to hallow at Turner?

A. That is the first thing I done to him, yes, sir, but I signalled the engineer first.

Q. How long before?

A. Just that quick. (Snapping fingers.)

Q. Hadn't you been looking at "24" come in?

A. No, sir.

Q. "24" had just come in and stopped at the station?

A. I know something went by there but I was engaged in my own business.

Q. "24" was making a lot of noise and confusion?

A. Yes, sir, it might have been.

Q. It was running north as you were going north too?

A. Yes, sir.

Q. Your tracks are how far apart?

A. We were the third track from the main line.

Q. So that there were two tracks between you and the main line?

A. Yes, sir.

Q. And both trains running north?

A. Yes, sir.

Q. I will ask you if you can recall anything about the wind that day?

A. It was a very quiet day, I believe.

Q. No wind?

A. No wind to speak of, no, sir.

Q. When you struck Turner did you remain on the flat car?

A. I did.

Q. What did Portelle do?

A. He remained there too; I don't know when he got off; he got off before I did.

Q. How far did you run after you struck Turner before he got off?

A. I don't know.

Q. How far did you run after you struck Turner before you got off.

A. I don't know.



Q. Did you come to a full stop before you got off the car?

A. I would not say as to that either.

Q. I will ask you if you remember that Mr. Turner had stepped his left foot clear over the west rail before you struck him?

A. He had his left foot, I believe it was, inside of the track when we struck him.

Q. Which way was he walking?

A. He was walking north when I first seen him, and he angled north-west when he went to cross the track.

Q. Did you look at him and see him looking at "24" or some other object?

A. No, sir.

Q. Which direction was he at that time from "24"?

A. He was east of the main line.

Q. Didn't you see "24" at the passenger station?

A. I don't know; it was a pretty exciting time for me and there might have been a dozen come in and I would not have seen them.

Q. Is your recollection about the accident any better than your recollection about the trains?

By W. H. Moore:

We object as not proper cross-examination.

By the Court: "Sustained."

By John C. Moore:

Q. Can you remember the incident of Turner having stepped his left foot over the rail before he was struck?

By the Witness:

A. I would not swear as to that.

Q. Isn't it a fact that he had stepped his

left foot over and was in the act of stepping with his right foot when you hallowed?

A. I would not swear to that.

Q. I will ask you if you didn't tell Victor Reems that you hallowed after he had stepped his left foot over the track?

A. I would not state which foot he had in the track.

Q. He had one foot over the track, did he?

A. He had one foot between the rails.

Q. And one on the west side of the rails?

A. He might have been in the act of bringing it over; I don't know.

Q. He was practically over the west rail at the time you hallowed?

A. Yes, sir.

Q. Isn't it a fact that he stepped that left foot over the rail on to the ground and just then you hallowed?

A. When he started to step in the track I hallowed.

Q. Didn't you hallow at him just as he stepped his left foot over the west rail of the track?

A. I hallowed at him when he went to step into the track.

By W. H. Moore:

It is apparent that the witness is confused as to directions there.

By John C. Moore:

Q. You can demember what is east and west down there?

By the witness:

A. I can take you down there and show you.

Q. You can remember east and west down there?

A. Yes, sir.

Q. Hadn't he stepped his left foot over the west rail of that track two when you hallowed at him?

A. No, sir.

Q. He hadn't stepped his left foot over the west rail of that track?

A. He didn't have his left foot over the west rail.

Q. Wasn't he in the act of stepping over the left rail when he was struck?

A. No, sir.

Q. Isn't it a fact when you hallowed at him he turned to the right in this kind of a manner. (Indicating by looking over right shoulder.)

A. I didn't see him make a turn of any kind until the draw-bar struck him.

Q. Stand up and show the jury where the draw-bar struck him?

A. (Standing) He was standing this way and the draw bar struck him there. (Indicating left of center of back just above hips.)

Q. With reference to the two rails where was he when the draw-bar struck him?

A. He was very close to the center of Number Two, between the rails.

Q. Which direction was his face?

A. In a north-west direction.

Q. But he didn't turn to look in any direction?

A. No, sir.

Q. Did you hear any signal when the train began to back from the main track?

A. We were not on the main track; we were on the passing track.

Q. Will you tell me how you got on the passing track?

A. We headed in at the north end of the track coming in here.

Q. You didn't come on the main track at all?

A. No, sir.

Q. Did you hear any signal while you were on the passing track as you began to back?

A. I did.

Q. What was it?

A. The bell was ringing.

Q. Did you hear any whistle?

A. No, sir, he didn't whistle.

Q. Tell the jury how many taps of the bell was given before you started to back?

A. I was not there when he started to back; I rode these cut-off cars in and I caught him as he came down and the bell was ringing when I caught him.

Q. You didn't hear the bell ring when you began to back to take off that cut off cars, did you?

A. Well, I would not swear it was or was not when we cut off the cars.

Q. After those cars were cut off then the engine ran south?

A. I don't know whether he ran north or whether he stopped before he got to the switch.

Q. You don't remember whether the engine proceeded far enough that it passed the switch before cutting off the cars?

A. We might have cut the cars off if he

could stop before he come to the switch, I was not there.

Q. If he did that, it would be in the nature of a running switch?

A. No, sir, it is just common, ordinary kicking them in.

Q. Then he would have to retire back?

A. Then he would go back to the track where he wanted to go without going ahead.

Q. After he had pushed those cars up he came to a stand then, did he not?

A. Yes, sir, after he cut them off.

Q. When he started to back that time did you hear any whistle signal given?

A. No, sir.

Q. Did you hear any bell signal for backing—I don't mean ordinary ringing—I mean the signal for backing?

By W. H. Moore:

We object until he shows there is a signal for backing.

By the court:

Yes, sir; you had better ask him if there is a signal for backing when the engine is standing.

By the witness:

A. If you want a man to come to you, you give him this way. (Indicating by signal with arms and hands.)

By the Court:

Q. Is there any rule that requires the engineer to do anything before he starts to backing his engine?

A. In ordinary yard work they generally ring the bell, but they never blow the whistle unless there is a crossing and there was no crossing at that end.

By Jno. C. Moore:

Q. Is that the rule of the Company or a practice?

By the witness:

A. It is a rule of the Company to blow a whistle for crossings.

Q. Have you with you the book of rules?

A. No, sir; but it is in the whistle signals.

Q. What is the date of the last book of rules?

A. 1910, I believe; I would not be sure of it.

Q. I will ask you if in that 1910 book of rules that the engineer is not required to give two short blasts of the whistle before he begins to back?

A. No, sir.

Q. I will ask you if he is not required to give two short blasts of the whistle when he receives a signal to stop?

A. No, sir.

Q. I will ask you if the engineer is not required under Rule 44 to give three short blasts of the whistle when he is standing before he starts to back?

A. He is.

Q. Did you hear them?

A. I did not.

Q. I will ask you if there is a signal to stop given to the engineer by a brakeman or flagman. if he is not required to answer that with two short blasts of the whistle under Rule 42-A?

A. He answers it, yes sir.

Q. Did you hear them?

A. I didn't hear them, no, sir.

Q. I will ask you when a brakeman or flagman neglect to signal to the engineer is he is not required to give four short blasts of the whistle calling for signals under Rule 46?

A. He is required to call for signals.

By W. H. Moore:

This is objected to as entirely immaterial; these rules apply to road signals and not to yard work.

By the Court:

That is the way I understand it. Sustained.

By the Witness:

That is all they apply to.

By Jno. C. Moore:

Q. I will ask you this: Before starting to back, if the engineer gave two taps of the engine bell under Rule 53?

By the witness:

A. I don't know whether he gave two; the bell was ringing when he came in there.

Q. You didn't hear the two taps?

A. I did not; I heard the bell ringing.

Q. I will ask you if he didn't give you two taps for the purpose of examining the air?

A. They don't use the engine bell for that.

Q. Didn't he give you two taps with the bell to inform you that the air is working?

A. No, sir.

Q. Do you say that is not Rule 53?

A. I don't say as to that, but he don't use the engine bell for signals.

Q. I will ask you when you gave that signal to the engineer if you heard two short whistles of the engine?

A. No, sir; in a case of that kind it would

have taken him longer to stop; he would have had to get the whistle and then stop.

Q. Isn't he required under Rule 44 to make these two whistles?

By W. H. Moore:

We object as wholly immaterial; this applies to road work.

By Jno. C. Moore:

That is what I have got, the rules applying to yard work, Rule 104.

By the Court:

Now, "When a train is being pushed by an engine, except by shoving and making up trains in a yard"—— (Reading from Rule Book.) The objection is sustained.

By John C. Moore:

Q. Were you acquainted with Mr. Turner during his life time?

By the witness:

A. Not personally, no, sir.

Q. Do you know what the distance is between the two rails of the track?

A. Four feet and eight inches, I believe; something like that.

Q. From the position that Mr. Turner was walking when struck, in what manner would he likely have been thrown down?

By W. H. Moore:

That is objected to as calling for an opinion.

By Jno. C. Moore:

Q. In what manner was he thrown down?

By the witness:

A. I don't know; when we found him his head was to the east with his face downward.

Q. You don't know how he fell?

A. No, sir.



Q. But you say he didn't turn?

A. No, sir, he didn't.

Q. You heard no kind of signals from the train backing up except the mere ringing of the bell?

A. Yes, sir, the bell was being rung; that is all.

Q. That is all you know about the signals being given?

A. That is all that is required in yard work.

By Jno. C. Moore:

That is all.

WITNESS EXCUSED.

C. O. Crump, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore.

Q. State your name?

By the Witness:

A. C. O. Crump.

Q. Where do you live?

A. Kansas City, Kansas.

Q. What is your business?

A. Baggage man on the Rock Island.

Q. What were you doing on the 28th day of July, 1912?

A. Going north.

Q. On what train?

A. Rock Island "24."

Q. Do you recollect what time that train reached Enid that day?

A. About five o'clock; something like that.

Q. It was still day-light, was it?

A. Yes, sir; summer time.

Q. Do you recollect seeing a man struck and injured or killed on that afternoon?

A. Yes, sir.

Q. I wish you would tell the jury all you know about it, and how you came to see it?

A. I was sitting in the baggage door as we pulled into Enid; there was a switch crew switching in the yard and had a flat car with a separator on it and they were hallowing; it attracted my attention and I looked out and about that time it backed over the man, and we stopped at the crane for water and I told the Conductor they had killed a man up there.

Q. The first thing that attracted your attention was these men hallowing?

A. Yes, sir.

Q. How far was he at that time in front of the moving flat car?

A. I judge 35 or 40 feet.

Q. Did you see the train strike him?

A. Yes, sir.

Q. Then what happened?

A. He went under and that is the last I could see of him.

Q. Why was it?

A. There was cars in the way there.

Q. What were you sitting on there in front of the door?

A. I was sitting on a trunk.

Q. Who was with you?

A. Mr. Eppler.

Q. Who is he?

A. He is the Express Messenger.

Q. Can you give us any idea of the length of time it was from the time you heard these

men hallow until you saw the man go under the train?

A. Well, it was a short time.

Q. Did you do or attempt to do anything during that time that would give any idea of the time it took?

A. I tried to get out of the door in time to avoid seeing the accident.

Q. Did you?

A. No, sir.

Q. Are you able to tell how fast that freight train was moving at the time it struck Mr. Turner?

A. No, I am not.

Q. You were on a moving train going in the same direction?

A. I was going the same way, yes, sir.

Q. Where did you make your first stop in Enid that night?

A. At the water tank.

Q. Where next?

A. At the depot.

By W. H. Moore: "That is all."

CROSS EXAMINATION.

By John C. Moore:

Q. Mr. Crump, did you see this man that was killed enter upon the track?

By the Witness:

A. He was walking down the center of the track when I saw him.

Q. In which direction was he walking?

A. Going North.

Q. You saw him struck, did you?

A. Yes, sir.

Q. Stand up and show the jury how he was struck?

A. (Standing and indicating.) He was

walking this way with his hands behind him (Indicating leisurely movement with hands near hips behind back) and I suppose the draw-bar hit him about there. (Indicating near center of back just above hips.)

Q. Which way did he fall?

A. He doubled right under.

Q. Did you see him turn before he was struck?

A. He turned his head to the right just a little before the car struck him.

Q. You think he was struck about the middle of the back?

A. I do.

Q. I will ask you if you can remember that he had stepped his left foot or one foot over the west rail of the track at the time he was struck?

A. No, I think not.

Q. You say he stopped at the time he was struck?

A. No, sir, he just turned his head a little towards the right.

By John C. Moore:

That is all.

#### WITNESS EXCUSED.

William T. Eppler, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of Defendant, testified as follows, to-wit:

#### DIRECT EXAMINATION.

By W. H. Moore:

Q. State your name?

By the Witness:

A. William T. Eppler.

Q. Where do you live?

A. Kansas City, Kansas.

Q. What is your business?

A. Express messenger for the United States Express Company.

Q. Were you so employed on the 28th of July, 1912?

A. I was.

Q. What was your line on that day?

A. I was on Rock Island Train 24 between Fort Worth and Kansas City.

Q. About what time of day did that train get into Enid at that time?

A. Well, I believe 5:30.

Q. It was day-light, was it?

A. It was.

Q. Do you recollect the occurrence of seeing a man struck by a moving flat car in the yards at Enid on that day?

A. I do.

Q. Tell the jury all you know about it?

A. I was sitting in the car and saw the switching crew back up, and saw a man walking down the track with his hands behind his back, and I heard two men hallowing and looked out and noticed they were going to back up over this man and before there was time to do anything he was struck.

Q. What was the first thing that attracted your attention?

A. The hallowing of the men on the flat car.

Q. Did you know the man that was walking down the track?

A. No, sir.

Q. You didn't know W. L. Turner of Enid?

A. No, sir.

Q. How far ahead of the flat car was he when you first saw him?

A. I would judge he was possibly a car length.

Q. Did you see him when the train struck him?

A. I did.

Q. Did you or not lose sight of the train then?

A. Immediately afterwards.

Q. Was it shut off from your view?

A. A line of box cars did, I think.

Q. Where was the first stop you made that day in Enid?

A. At the water tank.

Q. How clear is your recollection of them stopping at the water tank?

A. Positive.

Q. Where was the next stop?

A. At the station.

#### CROSS EXAMINATION

By Jno. C. Moore.

Q. You say you are positive you stopped at the water tank?

By the witness:

A. Yes, sir.

Q. Can you remember it distinctly or as a custom that you were in the habit of stopping there?

A. I remember it distinctly.

Q. That train usually stopped at the water tank?

A. I cannot say it did at that time; it does now. But there was a time when we didn't stop there for water.

Q. In those days you didn't usually stop there for water?

A. No, sir; well, I am not so sure about that.

Q. You say you are sure you stopped at the water tank on that day?

A. I am positive we stopped at the water tank on that day.

Q. And as you stopped at the water tank the cars came up between you and this man that was killed?

A. No, sir, the cars were there all the time.

Q. And as you pulled from the water tank to the station you got out of sight of where the man was killed?

A. No, sir, I was out of sight when we stopped at the water tank.

Q. You didn't actually see the occurrence then, did you?

A. I did.

Q. I will ask you if you can tell now in which direction the man that was killed was walking?

A. He was walking north.

Q. Where?

A. Between the rails of track two, I believe.

Q. Wasn't he really walking north-west?

A. He was walking directly down this track at the time I saw him.

Q. Directly north?

A. Yes, sir.

Q. Did you see him step over either of the rails before he was struck?

A. I did not.

Q. Did you see him struck?

A. I did.

Q. Will you have the kindness to stand up

and point out the place where he was struck as near as you can on your body?

A. (Standing and indicating) I believe he was struck right in the small of the back, would be my idea about it.

Q. How far were you away from him?

A. Possibly thirty feet at the time.

Q. You believe he was walking straight along in the center of the track?

A. He was.

Q. Did you state how far away from him the cars were that struck him when you first saw them?

A. To the best of my judgment they were about a car's length.

Q. About forty feet?

A. Forty feet, possibly.

Q. And they ran that distance upon him while he was still walking in the center of the track?

A. They did.

Q. How many feet did he walk in the center of the track after you saw the cars approaching him?

A. That would be very hard to say; very few steps, possibly one or two or three.

Q. I will ask you if you saw him enter upon that track?

A. I did not.

Q. The first you saw of him was when he was in the track?

A. It was.

Q. In the center of it?

A. Yes, sir.

Q. And walking north?

A. Walking north.

Q. And the car was coming behind him;



did he seem to be conscious of the approach of the car?

A. He was not.

Q. Did you see any signals given by any of the brakemen on this approaching car?

A. I did.

Q. Did you hear any sounds?

A. I heard the hallow.

Q. How many times did you hear them hallow?

A. They were continually hallowing until he was struck.

Q. Did you notice him stop before he was struck?

A. No, sir.

By Jno. C. Moore: "That is all."

RE-DIRECT EXAMINATION.

By W. H. Moore.

Q. You said you had a distinct recollection of stopping at the water crane that night; what is it that impressed it on your mind?

By the witness:

A. Our Conductor came by the car while we were stopped and I told him of the accident at the time. He was on his way to the station to get orders at the time.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

V. J. Reems, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of defendant, testified as follows, to-wit:

DIRECT EXAMINATION.

By W. H. Moore:

Q. State your name?

By the Witness:

A. V. J. Reems.

Q. Where do you live?

A. El Reno.

Q. What is your business?

A. Fireman for the Rock Island.

Q. How long have you been working for the Rock Island?

A. I have been firing since the 20th of January, seven years ago.

Q. Were you employed by the Company before you commenced firing?

A. Yes, sir.

Q. What were you doing?

A. In the B. and B. Department.

Q. How long have you been in the railroad service?

A. About nine and one-half years.

Q. Were you Fireman on engine 2113 with Engineer George Wallace that struck and killed Mr. Turner in the Enid yards on the 28th of July, 1912?

A. Yes, sir.

Q. Tell the jury all you know about it?

A. I was firing engine No. 2113 on that day, and we had headed into the north end of the yard and pulled a train over the crossing; after that we had some cars to pick up on Number Two track and we backed in there and had just got to work; we could see up the track and I saw a man walking up between two and three, and all at once he disappeared from my sight and I didn't know where he went to; I thought perhaps he had stepped in the clear between the cars on the other track; I never knew we had struck the man until after the brakeman came to the engine and told us.

Q. That is after the train had been stopped?

A. Yes, sir.

Q. What are your duties on there as fireman?

A. Why, it is to keep the engine hot, and in switching and backing up to look out for signals and to see that the bell is rung.

Q. Was the bell ringing on this occasion?

A. Yes, sir.

Q. You say the man disappeared from your view, what do you mean by that?

A. Out of my sight.

Q. Did you see which way he went?

A. No, sir.

Q. And the next you knew of him he had been run over?

A. Yes, sir.

Q. Did you see the signals given by the brakeman?

A. No, sir.

Q. The first you knew of it was when they told you?

A. Yes, sir.

Q. How fast was your engine moving at the time it stopped or just before it stopped?

A. About eight or ten miles an hour.

Q. Did it attract your attention when the air went on?

A. Yes, sir.

Q. How far in your judgment did the train move after the air went on?

A. About four car lengths.

Q. After the train was stopped did it move again?

A. Yes, sir.

Q. How far?

A. About a car length, I judge.

Q. Back away from the body?

A. Yes, sir.

By W. H. Moore: "That is all."

CROSS EXAMINATION.

By Jno. C. Moore:

Q. You know Mr. George Kendrick, do you not?

By the Witness:

A. Yes, sir.

Q. He was a brakeman?

A. Yes, sir.

Q. Did you have a conversation with Mr. Kendrick about how the accident happened?

A. No, sir.

Q. Did he never tell you that he hallowed at the man that was on the track?

A. I don't know that he told me; I heard the conversation that he hallowed at the man on the track.

Q. I will ask you if you told Charlie Ballard that if the brakeman had not hallowed at the man he would not have been struck?

A. I don't know the man.

Q. Do you know the bridge gang that has been working here on the coal chutes for the last two days?

A. No, sir.

Q. You don't know Charlie Ballard?

A. No, sir.

Q. You didn't say to him that if Kendrick or Portelle had not hallowed at Turner he would not have been killed?

A. No, sir.

Q. Didn't you give that as your opinion?

A. No, sir.

Q. Were you sworn before the Coroner?

A. Yes, sir.

Q. In your testimony before the Coroner did you not say if the brakeman had not hallowed at him he would have passed in the clear?

A. No, sir.

Q. I will ask you when the man disappeared from your sight how it happened that you didn't see him disappear?

A. Because one step either way would have put him absolutely out of my sight.

Q. Did you when you found he had disappeared, give Mr. Wallace a slow up signal?

A. No, sir.

Q. Did you give him a stop signal?

A. No, sir.

Q. Did you inform him of what you had seen?

A. No, sir.

Q. You didn't absolutely see him turn in either direction?

A. No sir.

Q. You didn't see him step on track two?

A. No, sir.

Q. What was there on track 3 that would obstruct your view?

A. Nothing.

Q. If he had gone over on to track 3, he would still have been in your sight?

A. No sir.

Q. But still there was nothing to obstruct your view?

A. Not to obstruct my view where he was at.

Q. I understand you.

A. Number three was full of cars; the way the man was walking between the tracks he was in my sight, but he could come to an

opening any place there and step between two cars and be out of sight.

Q. Did you do anything to give him a signal that you were approaching?

Q. No, sir, only to ring the bell.

Q. Did he seem to be noticing the fact that you were ringing the bell?

A. I could not say as to that; he was walking right down the track.

Q. How long had you been with your engine in the south end of the yard?

A. I don't know; just a short time, after we arrived in Enid; I believe ten minutes would cover it.

Q. "24" came in after that?

A. Yes, sir.

Q. Was there any other engine or cars down in that part of the yard, south, then?

A. Cars, but no engine.

Q. There was no other engine down in that part of the yard?

A. No, sir.

Q. Can you remember where there were cars in that part of the yard?

A. There was cars on the passing track. There was a cut-off shoved in on the passing track, and there was cars on Number One about opposite from the cut that was on the passing track.

Q. Up near the freight depot?

A. Up in that way. And, there was cars on Number 3 still on in the yard.

Q. Still farther north?

A. No, east.

Q. I mean farther north than these other cars on the house track and track two?

A. I would not say for sure there was

cars in there, but how many I don't know. There was cars right along the side of us.

Q. That is up in front of the freight house?

A. I don't know whether they were up that far or not.

Q. Where did this accident take place with reference to the freight house?

A. About opposite the north end of the freight house.

Q. Was there any cars there?

A. I think that was about the end of the cars on Number 3 and the two cuts on Number 2 and the passing track. There was an opening clear across to the main line.

Q. So there were no cars on No. 3 north of the point where Turner was killed?

A. I don't know.

Q. Did you notice any cars on the track known as the house track?

A. Well, there is two or three different house tracks down there.

Q. On that particular track that is first east of the freight depot, did you notice any cars?

A. I don't know; we had not been in there and I don't know, but I judge there was.

Q. You passed down on the passing track?

A. Yes, sir.

Q. Two tracks farther east?

A. Yes, sir.

Q. You cannot remember whether there was any cars on the house track or not?

A. No, sir, I could not say.

Q. There was not any on the main track?

A. No, sir.

Q. There were those on the passing track that you had put there?

A. Yes, sir.

Q. Were there any others in that, locality?

A. There was cars on Number Two and on across on Three.

Q. I am talking about the passing track; there was no cars there except what you put there?

A. Yes, sir.

Q. On track One was there any cars?

A. Yes, sir.

Q. Where?

A. Near the south end of Number One.

Q. How far is the north end of Number One, where it finally reaches the main line through the lead?

A. I don't know, about 120 feet, something like that distance.

Q. Were there any cars on Track Two as you were proceeding up?

A. Yes, sir.

Q. How far ahead of you?

A. Down near the crossing, north of the depot.

Q. That is over to the north?

A. Yes, sir.

Q. It was after a car of that kind that you were going?

A. Yes, sir.

Q. How far distant from you was that car from where the accident happened?

A. I don't know.

Q. It was a good ways, was it not?

A. Yes, sir.

Q. And you were moving with a good deal of celerity and speed, were you not?



A. No, sir.

Q. How far did you say your train ran after the air was put on?

A. About four car lengths.

Q. What is the length of a car of that estimate?

A. An average car will run about 35 or 40 feet.

Q. So it ran about 160 feet, do you think?

A. I don't know, about four car lengths would be my judgment.

Q. That was as far as the length of your train, was it not?

A. Yes, sir.

Q. When the engine came to the stop, were you on the engine?

A. Yes, sir.

Q. Did you see Portelle?

A. After the engine came to a stop; yes, sir.

Q. Did you hear him tell Mr. Wallace that you had run over a man.

A. Yes, sir.

Q. Was Kendrick there at the time?

A. I don't know.

Q. Had the engine came to a stop at that time?

A. Yes, sir.

Q. How far were you away from the body of Turner?

A. About fifteen feet, I think.

Q. Which way?

A. North of him.

By John C. Moore:

That is all.

RE-DIRECT EXAMINATION.

By W. H. Moore.

Q. How long was it after you said this man disappeared from your sight when you felt the air come on?

By the witness:

A. I could not say, exactly, but it was a very short time, almost instantly.

Q. Was it seconds or split seconds?

A. I don't hardly know, but I would judge in less than twenty seconds, maybe sooner.

By W. H. Moore:

That is all.

#### WITNESS EXCUSED.

CHARLES S. YEATON, a witness, of lawful age, being first duly sworn by the Clerk of the Court, and being called as a witness upon the part of the defendant, testified as follows, to-wit:

#### DIRECT EXAMINATION.

By W. H. Moore:

Q. What is your name?

By the witness:

A. Charles S. Yeaton.

Q. What is your business?

A. Supervisor of Locomotive Operation for the Rock Island.

Q. How long have you been in the service of the Rock Island Railroad?

A. Since 1884.

Q. How long have you been in the railway service?

A. Since 1879.

Q. What has been the character of your employment during that time; what positions have you held?

A. From fireman to engineer, and Gen-

eral Foreman at Caldwell, Kansas, and Road Foreman of Equipment and the present position.

Q. How long were you in the road service?

A. From 1884 until 1905.

Q. At present you are located at El Reno?

A. Yes, sir.

Q. Can you tell us the length of Engine No. 2113?

A. Between sixty-eight and sixty-nine feet.

Q. That is, over all, from the point of the pilot?

A. Yes, sir.

Q. That includes the tender?

A. Yes, sir, engine and tender.

Q. About what is the length of a box car; what are the lengths that box cars run?

A. They run from 40 to 45 feet over all; that is, including both draw-bars.

Q. What is the length of flat cars, over all?

A. They run from 33 to 38 feet, over all.

Q. Have you had any experience in stopping engines in service?

A. Yes, sir.

Q. I will ask you if you have had occasion to make any test to see in what distance a No. 2100 engine, with two cars attached, can be stopped, on a level track?

A. I did; yes, sir.

Q. When did you make that test?

A. One day last week, at El Reno.

Q. Whereabouts at El Reno?

A. On what is called the out-go track on

the Pan-Handle Division, Main Line.

Q. Who was the engineer operating that engine?

A. Engineer George Wallace.

Q. Who was on the stand today?

A. Yes, sir.

Q. Tell the jury the conditions of that test, what the result was and how it was made and all about it?

By Jno. C. Moore:

We object as incompetent, irrelevant and immaterial, and as self-serving.

By the Court: "Over-ruled."

By Jno. C. Moore: "Plaintiff excepts."

By the witness:

A. Mr. Wallace was told—

By Jno. C. Moore:

I object to the conversation being detailed.

By W. H. Moore:

This is the reason for it: The test was made there and he is going to tell what directions were given each person who made the test.

By the Court:

Well, he can do that without stating the conversation.

By the witness:

A. Under perfect conditions, and with a flat car and a box car—

By Jno. C. Moore:

I object unless it was engine 2113.

By the Court:

Of or similar character and size.

By Jno. C. Moore:

I am objecting to the testimony of the witness because it is not shown that a 2100 engine was used at El Reno, and at the time of that

test was in the same physical condition that 2113 was in at that time.

By the Court: "Over-ruled."

By Jno. C. Moore: "Exception."

By W. H. Moore:

Q. Proceed.

By the witness:

A. I used a flat car, a box car and a 2100 engine, about in the same physical condition as engine 2113 was at the time of the accident—

By Jno. C. Moore:

Before you proceed, I want to ask you a question. How do you know it was in the same physical condition of 2113?

By the Court:

You can ask that on cross-examination. Over-ruled.

By Jno. C. Moore: "Plaintiff excepts."

By the witness:

A. Mr. Wallace was told what we wanted to do in making this test. I rode on the front end of the engine, starting in back from a point we were to get his speed with a stop watch, telling him to run about the same speed he was running in the Enid yard at the time of the accident as near as he could guess it. He had attained a speed of twelve miles per hour when the stop signal was given; he expected this stop signal, had his hand on the brake when he gave it, and stopped in 121 feet and nine inches.

By W. H. Moore:

Q. From your experience as a road engineer, how would that sort of stop, made under those conditions, a man sitting there expecting the signal, with his hand on the air, how would

that compare with an emergency stop where he got the signal from the brakeman?

A. It might make a difference of forty or fifty feet, or thirty or forty feet.

Q. Tell how that is?

A. Because of the position of the engineer; he would be hanging out of the window, backing up and when he got the stop signal he would make a service application and at the next signal would go to the emergency, and that time intervening would allow him to make thirty or forty feet difference.

Q. Suppose he went immediately to the emergency, would the fact that he was expecting the signal in one instance and not in the other, would that have any influence?

A. No, I would think not, because he is expecting a signal all the time. He is working with the men, expecting a signal of some kind.

Q. Are you able to tell us whether on the 28th day of July, 1912, engine 2113 was an oil or coal burner?

A. It was an oil burner.

Q. Are you able to tell me what engine was pulling Train 24 on the 28th day of July, 1912?

A. No, sir.

Q. On July 28, 1912, was Engine 806, an oil or coal burner, do you recall?

A. I think a coal burner; I am not positive, but I think it was a coal burner.

Q. Which makes the most smoke, an oil or coal burner?

A. That is according to how they are fired; if properly fired the coal burner would make the most smoke; the oil burner should make no smoke.

CROSS EXAMINATION.

By Jno. C. Moore:

Q. Did you participate in the test that you have described at El Reno?

By the witness:

A. Yes, sir.

Q. Who else besides Mr. Wallace and yourself?

A. A Round House Foreman, Mr. Haman, at El Reno, and Mr. Moore.

Q. Is Mr. Moore, the attorney, here present?

A. Yes, sir.

Q. What duties did the Round House Foreman perform on that occasion?

A. He helped us measure the distance, and was down there when we got the cars together, helped us couple the cars together.

Q. Did he ride on the rear end of the flat car you had attached there?

A. No, sir, he was riding on the front end of the engine with me.

Q. Who was on the rear?

A. Nobody.

Q. You made no signals from the rear of the train?

A. The signals were made by Mr. Moore, who stood at a given point on the ground; it was all lined up before we started to make this test.

Q. Everything was prepared for that test?

A. Yes, sir.

Q. You were backing, were you not?

A. Yes, sir.

Q. There was nobody that rode on that

advancing car that gave Mr. Wallace the signal to stop?

A. No, sir, it was given directly to the engineer.

Q. From the ground?

A. Yes, sir.

Q. And he was expecting it, of course?

A. Yes, sir.

Q. And was prepared for it?

A. Yes, sir.

Q. And you succeeded in stopping in 121 feet?

A. 121 feet and nine inches.

Q. Did he put on the full emergency brake?

A. Yes, sir.

By Jno. C. Moore: "That is all."

WITNESS EXCUSED.

F. H. WALLACE, a witness, of lawful age, having been first duly sworn, and being RE-CALLED as a witness IN REBUTTAL upon the part of the Plaintiff, testified as follows, to-wit:

DIRECT EXAMINATION.

By Jno. C. Moore:

Q. Mr. Wallace, as Chief Clerk of the freight office in Enid, when you received the coal tickets and made the record in regard to them, what did you do with them?

By the witness:

A. They were forwarded to Chicago.

By John C. Moore:

That is all.

WITNESS EXCUSED.

W. M. HUTCHINSON, a witness, of lawful age, having been first duly sworn, and being RE-CALLED as a witness upon the part of



PLAINTIFF, in rebuttal and further cross-examination, testified as follows, to-wit:

EXAMINATION BY JOHN C. MOORE:

Q. Hr. Hutchinson, when Mr. Turner came to you at the cinder pile, as you testified today, and conversed with you about whether you had coal enough to run until Monday evening, and you heard the train whistle, what did he say and do?

By W. H. Moore:

Defendant objects as incompetent, irrelevant and immaterial and not proper rebuttal testimony.

By the Court:

Sustained.

By John C. Moore:

Q. You testified that he came and wanted to know if you had coal enough to do until Monday evening?

By the witness:

A. Yes, sir.

By W. H. Moore:

We object as incompetent, irrelevant and immaterial, not proper rebuttal testimony and repetition.

By the Court:

Are you recalling him for your witness or for further cross-examination?

By John C. Moore:

I am calling for further cross-examination.

By the Court:

Why don't you announce it?

By John C. Moore:

I could not tell him before they rested.

By the Court:

Yes, you could; that is the proper time to call him.

By Jno. C. Moore:

I want to ask to re-call him to the stand for further cross-examination.

By the Court:

Then, for that purpose, the Court sets aside the order of rest and permits the witness now on the stand to be re-called as a witness of the defendant to be further cross-examined by plaintiff.

By John C. Moore:

Q. Now, Mr. Hutchinson, when you heard the train whistle—

By the Court:

The only way that that can go in is by asking for all of that conversation, of which they have introduced a part.

By W. H. Moore:

The defendant objects as incompetent, irrelevant and immaterial.

By the Court:

Over-ruled.

By W. H. Moore:

Exception.

By John C. Moore:

Q. You may state what else Mr. Turner said and did at that time?

By the witness:

A. Well, he walked up to me and spoke, and asked me if I thought I would have coal enough to run me until Monday night. I said I didn't think I would. And he then pulled a match from his pocket and lit his pipe; about that time we heard the train whistle; he looked at his watch and said, "There is '24'; I must go to the freight depot and take my coal tickets

and order coal for the chutes." Then he turned around and walked off towards the freight depot.

By John C. Moore:

That is all.

By W. H. Moore:

That is all.

WITNESS EXCUSED.

### INSTRUCTIONS GIVEN.

10. If you believe from the evidence that the deceased, William L. Turner, was an employe of the defendant company, and was in the act of performing a duty of inter-state commerce for said Company when killed, and you further believe that both he and the said Company were guilty of contributory negligence, without which he would not have been killed, then your verdict must be for the plaintiff; but you shall diminish the damages in proportion to the amount of negligence attributable to said Turner. Provided, however, that if you believe from the evidence that the train and cars which killed the said Turner were run and operated without using or operating the train power brakes by the engineer from the engine pushing same, and the such failure contributed to the injury and killing, then you shall not hold the said Turner as being guilty of any contributaoy negligence, and shall not diminish the damages from that cause.—Given by the Court and excepted by the defendant. James W. Steen, judge.

18. You are instructed that though you may believe from the evidence that Turner was guilty of contributory negligence at the time he was killed, yet if you believe that the engine

and cars which ran over him and killed him were run by the defendant railway company in violation of any Statute of the United States, and that such running of said engine and cars in such violation of such statute contributed to the killing of said Turner, you shall then not hold said Turner guilty of contributory negligence, and the damages you shall find, if any, shall not be diminished by you be reason of his contributory negligence.—Given by the Court and excepted to by the defendant. James W. Steen, judge.

34. The Court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defedant was negligent in that the fireman in the cab with the engineman did not have the engine slowed or stopped when he saw the deceased entering on track two, until he should see that he had safely passed in the clear, as alleged in sub-division "J" of the tenth paragraph of plaintiff's petition.

40. The Court instructs the jury that there can be no recovery in this case upon the plaintiff's allegation that the defendant was guilty of negligence in running its train in violation of the Statute of the United States, as alleged in sub-division "P" of the tenth paragraph of plaintiff's petition.

#### INSTRUCTIONS REFUSED.

Defendant's Requested Instructions, No. 1:

The Court instructs the jury that under the law and the evidence in the case, its verdict must be for the defendant.

Offered by defendant; refused by the

Court, and exceptions allowed.—James W. Steen, judge.

Defendant's Requested Instructions, No. 22:

The Court instructs the jury that under the evidence in this case, the deceased, William L. Turner, at the time of his death was what is known as an independent contractor, and was not at said time an employe of the defendant, engaged in inter-state commerce within the meaning of the law, and its verdict must be for the defendant.

Offered by the defendant; refused by the Court, and exceptions allowed.—James W. Steen, judge.

### VERDICT.

“IN THE DISTRICT COURT IN AND FOR  
GARFIELD COUNTY, STATE OF  
OKLAHOMA.

A. P. BOND, ADMINISTRA-  
TOR OF THE ESTATE OF  
WM. L. TURNER, DECEAS-  
ED, PLAINTIFF,

VS.

CHICAGO, ROCK ISLAND  
AND PACIFIC RAILWAY  
COMPANY, DEFENDANT.

Case No. 1452.

### VERDICT

We, the jury empaneled and sworn to try the issues in the above entitled cause, do, upon our oaths, find for the plaintiff and against the defendant; and we fix the amount of recovery at \$7,583.00; which we divide as follows:

For Mrs. Ida Turner	-----	\$3,083
For Vera Turner	-----	400
For Mary Turner	-----	550
For Dorthea Turner	-----	650
For William Turner	-----	800
For Bessie Turner	-----	900
For Austin Turner	-----	1,200
And for Nellie and Annie Turner, we find nothing.		
(Signed)	FRED WALKER,	
	Foreman."	

Endorsed on Back as Follows:

VERDICT No. 1542, A. P. Bond,  
Administrator of the estate of Wm.  
L. TURNER, deceased,

vs.

Chicago, Rock Island and Pacific  
Railway Company.

Returned into open court and filed this  
3rd day of December, 1913.

GEO. M. SCIFRES, Clerk.

**"REMAND"**

BE IT REMEMBERED, That heretofore,  
to-wit; on Thursday, September 18th, A. D.,  
1913, the same being a day of the Special  
Guthrie Term, 1913, of the District Court of  
the United States for the Western District of  
Oklahoma, the following proceedings among  
others, were had by United States District  
Court, Honorable John H. Cotterel, presiding,  
as appears of record in my office:

"A. P. Bond, Administrator,  
Plaintiff,

vs.

The Chicago, Rock Island and

Pacific Railway Company, a  
Corporation,

Defendant.

No. 1174.

Now, on this 18th day of September, 1913, this cause comes on for further hearing upon the motion of the plaintiff to remand this cause to the District Court of Garfield County, Oklahoma. The plaintiff is present by his attorney, John C. Moore, Esq., and the defendant is present by its attorney, J. G. Gamble, Esq., Thereupon, the court now being duly advised in the premises, it is ordered that said motion to remand be and the same is sustained, and that this cause be, and the same is hereby remanded to the District Court of Garfield County, Oklahoma, at the costs of the defendant. To which order and ruling the defendant duly excepts."

UNITED STATES OF AMERICA,  
WESTERN DISTRICT OF OKLAHOMA, ss.

I, ARNOLD C. DOLDE, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the attached to be a full, true and complete copy of original order remanding the case of A. P. Bond, Administrator, Plaintiff, vs. The Chicago, Rock Island and Pacific Railway Company, a corporation, Defendant, No. 1174, in this court, to the District Court of Garfield County, Oklahoma, as the same appears in the record of the proceedings of said court on Thursday, September 18th, A. D., 1913, Honorable John H. Cotteral, presiding.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at office in the city of Guthrie in said District this 10th day of October, A. D., 1913.

(SEAL)

ARNOLD C. DOLDE, Clerk.

By W. W. HAWS, Deputy.

ENDORSED.

No. 1452.

C. R. I. & P. R. R. Co.

vs.

A. P. Bond, Adm.

Cause Remanded

to

Garfield County

Dist. Court.

Filed Oct. 11, 1913,

Geo. M. Scifres,

Clerk District Court.

Chg.

Filed

Oct. 11, 1913,

#### ASSIGNMENT OF ERRORS.

4. That the Supreme Court of the State of Oklahoma erred in holding that the said William L. Turner was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad, while engaging in commerce between several states, suffering an injury while he was employed by such carrier in such commerce.

5. That the Supreme Court of the State of Oklahoma and the District Court of Garfield County, Oklahoma, erred in its refusal to hold that the said William L. Turner, for and on



account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an independent contractor, and therefore not subject to the terms of the act of Congress, entitled: "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, (35 Statutes at Large 65), as amended April 5, 1910, (36 Statutes at Large 291).

6. That the Supreme Court of the State of Oklahoma erred in its affirmance of the action of the District Court of aGrfield County, Oklahoma, whereby there was admitted incompetent evidence, bearing upon the question whether the said William L. Turner, for and on account of whose death this action was instituted, was, at the time of sustaining the injuries from which he died, an employee of a common carrier by railroad engaged in interstate commerce, and as such himself engaged in inter-state commerce.

"38. The court instructs the jury that there can be no recovery in this case upon plaintiff's allegation that the defendant was negligent in that the brakeman waited to give the signal until the deceased was in imminent peril and that instead of giving the train signal he gave a loud and piercing yell, which caused Turner to stop and throw himself in a position where he could not escape injury, as alleged in subdivision N. of the tenth paragraph of plaintiff's petition. Unless you believe that the acts of the brakeman were not the acts of an ordinarily prudent man, considering the surrounding circumstances as they appear from the evidence."

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Counsel for Parties.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY  
COMPANY v. BOND, ADMINISTRATOR OF  
TURNER.

ERROR TO THE SUPREME COURT OF THE STATE OF  
OKLAHOMA.

No. 486. Argued February 23, 1916.—Decided March 20, 1916.

One who is not an employé of an interstate carrier, but an independent contractor, cannot recover, nor can his representative, under the Employers' Liability Act, even if killed or injured while engaged in services in interstate commerce.

Although a certain direction or information may be given by the carrier to one contracting with it, if, as in this case, the contract is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action to be judged by its results, and the person so contracting controls the manner of the work done by himself and those employed by him, he is a contractor with, and not an employé of, the carrier within the meaning of the Employers' Liability Act.

A contract to shovel coal on a per ton basis, and with provisions assuming all risk and liability for injury to, or for death of, himself and persons employed by him, between an interstate carrier and an independent employer of labor who had other contracts for work with the same carrier and with other companies, *held*, not to be an evasion of the provision of § 5 of the Employers' Liability Act, that any contract or device for exemption of the carrier's liability under the act shall be void.

THE facts, which involve the application and construction of the Federal Employers' Liability Act and the validity of a judgment in an action thereunder, are stated in the opinion.

*Mr. R. J. Roberts*, with whom *Mr. J. G. Gamble*, *Mr. M. L. Bell*, *Mr. C. O. Blake* and *Mr. T. P. Littlepage* were on the brief, for plaintiff in error.

*Mr. John C. Moore* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages caused by the railway company by the killing of the deceased, William L. Turner, through the negligence, it is alleged, of the company. It was brought in the district court of Garfield County, Oklahoma, and invoked the benefits of the Employers' Liability Act of Congress of April 22, 1908 (35 Stat. 65), c. 149, as amended April 5, 1910 (36 Stat. 291), c. 143. The case was removed on petition of the railway company to the United States District Court for the Western District of Oklahoma and remanded by that court to the state court. There an amended petition was filed by plaintiff in the action, to which an answer was filed.

After answer the case was tried to a jury, which returned a verdict for the sum of \$7,583.00, distributed in certain proportions among those dependent upon the deceased. Judgment was entered upon the verdict and sustained by the Supreme Court of the State.

The case went to the jury upon the effect of certain contracts between deceased and the company, whether he was the company's servant or a contractor with it, and whether, if he was the servant of the company, it was guilty of negligence or whether he was guilty of contributory negligence.

The facts are not much in dispute. The company is an interstate common carrier and its line runs through the limits of the City of Enid, Garfield County, State of Oklahoma. Within the city there are six parallel tracks which run nearly from the north to the south, bearing as they proceed a little to the west. At the south end near their termination are located coal chutes, into the pockets or tipples of which coal is shoveled from cars set on the chutes for the use of all engines, local and interstate. The City of Enid has the power to establish and

did establish by ordinance a speed limit of ten miles an hour for all trains within its limits, beyond which it was unlawful to proceed.

The relation of Turner to the railroad company was under two contracts, one dated November 1, 1910, the other October 1, 1911. In the first contract the railroad company is party of the first part and Turner party of the second part and is called "Contractor." The covenants of one are made the consideration for the covenants of the other, and Turner, as contractor, agrees first "to furnish all the labor required and necessary to handle; and (a) to handle all the coal required by the company at Enid, from either open or closed cars, or both, and to place the same in coal chute pockets of the company; to gather up all coal that falls from the coal chute pockets to the ground and place the same on cars or engines as desired by the company. (b) To break all coal to the size of four inch cubes or less before delivery to chutes for engine use and to unload all coal for stationary boilers. (c) To unload wood from cars to storage piles located on company's right of way in Enid. (d) To load cinders from the right of way to cars at points designated by the company. (e) To unload sand from cars furnished by the company at points designated by it.

2nd. The company agrees to pay for the services enumerated in certain designated numbers of cents per ton, or cord or yard, as the case may be, to be paid upon estimates and records of the company.

3rd. Contractor agrees to maintain a sufficient supply of coal in the coal chutes and break or crack all coal to suitable sizes.

4th. Contractor expressly assumes all liability for injuries to or death of persons in his employ or loss or injury to his property, whether caused by the negligence of the company, its agents or employees, and he covenants to save the company harmless on account thereof, or for

or on account of any injury to or death of any person employed by him when and while such persons may be in or about the cars, engines and tracks of the company, "and any injury to said contractor while performing any services under this contract which might be or have been delegated to his agent or employees." And the contractor expressly assumes all liability for injury to or death of third persons, including the employes of the company, occasioned by any of his acts, and the company shall not be liable to him in case of his death or injury while employed in the work set forth.

5th. Punctuality of performance is stipulated for; (6th) the contract to continue until terminated, as it may be by either party upon fifteen days' notice; (7th) or upon failure of contractor to perform his duties, at the option of the company, without being liable in damages therefor, of which failure the company shall be the sole judge; (8th) the company to furnish the necessary tools for the performance of the stipulated services.

9th. It is "agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

10th. The company shall keep a record of all coal delivered and shall make settlements and pay the contractor for handling the coal upon the basis of such handling, and the contractor shall make daily reports of the cars unloaded by him and shall receive, collect and deliver to the duly authorized representative of the company a ticket from each engineman, hostler or other employee, showing the number of tons of coal delivered to any engine; (11th) payment of the work to be made monthly; and (12th) the contract and all the terms and conditions, rights and obligations thereof, to inure to the heirs, administrators, executors, legal representatives,

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Opinion of the Court.

assigns and lessees of both parties, but assigning or subletting shall not be without the written consent of the company.

Under the other contract Turner was required to cooper all cars which the Round House foreman directed him to prepare to fit the cars to hold grain in transit, the foreman to be the sole judge whether the preparation was in accordance with the contract. The manner of preparation is detailed and the price to be paid therefor in cents, the company to furnish the materials.

There are provisions as in the other contract to save the company from liability to persons or property. The contract was to continue until terminated upon thirty days' notice.

This contract is pertinent only for illustration, and otherwise may be put out of view. The deceased was killed, it is the contention, while performing services under the first contract.

Turner had a contract with the Enid Mill & Elevator Company to unload coal, and, directly after 4 o'clock on the day he was killed, having finished a particular service at which he and one of his employés had been engaged, remarked that he would "go down and gather up the tickets and order a car of coal for the morning," and started down the tracks toward the chutes.

He next appeared about 5:25 o'clock at the cinder pile of the Enid Mill & Elevator Company at what is designated as the "White Mill," and there had a conversation with an employee of that company, and asked him, the employee, if he thought he would have enough coal for the boiler room to run until Monday night. While they were talking a passenger train signaled its approach to the station and Turner said, "That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes." He then started towards the freight house.

The trial court thought the testimony was indefinite of Turner's intention and hesitated to decide that he was engaged in services to the railway company rather than to the Enid Mill & Elevator Company, but finally left it to the jury to decide.

From the "White Mill" Turner passed along the tracks of the railroad and was seen by a witness walking between tracks 3 and 4 with his hands behind him, and while so walking and when he was at a point east of the north end of the freight house an engine and two box cars and a flat car, backing on the track to his left in the direction in which he was going, and running at about 25 miles an hour and in excess of the speed limit prescribed in the ordinance, ran over and killed him. It is a reasonable conjecture that the character of the day and the noise and confusion of the approaching passenger train so distracted his attention that he did not hear the approach of the backing cars and warning yells of the brakeman and apprehended no danger.

Besides excessive speed there were other elements of negligence by the company which the plaintiff relied upon.

We may pass by the assignments of error based on the rulings upon the evidence and in giving and refusing instructions. The determining consideration is the relation in which Turner stood to the company, whether he was an employee of it or an independent contractor.

The trial court submitted the question to the decision of the jury; the Supreme Court, considering the contract of November 1, 1910, hereinbefore set out, and certain testimony, decided that Turner was an employee of the company. The court said: "Not only did the contract reserve to the company the right to direct deceased in his work but it might be well to know, although we are only passing upon the face of the contract, that the company, pursuant to the power therein reserved, did that very thing, which confirms us in our opinion, gathered

from the face of the contract, that the same was not capable of execution without such direction and control. Such amounts to a practical construction of the contract by the company. Mr. Bowman, station agent and yard-master of defendant, testified:

“Q. From whom did Mr. Turner get instructions about handling work performed by him?

“A. Under his contract, from me.

“Q. You directed him what to do?

“A. Yes, either me or my chief clerk.

“Q. So that he was under your supervision and control all the time?

“A. In so far as the contracts were concerned, yes, sir.

“Q. He performed his duties in accordance with what you directed him to do?

“A. Yes, sir.

“Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island coal?

“A. Yes, sir.”

To which testimony this must be added:

“Q. Did you have anything to do with directing him in detail as to how he performed the terms of his contract?

“A. No, sir.”

We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of



his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect.

The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision for payment, from the careful assignment of liabilities and the explicit provision that Turner "shall be deemed and held as the original contractor and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; *Railroad Co. v. Hanning*, 15 Wall. 649, 656; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 227.

The case falls, therefore, under the ruling in *Casement v. Brown*, 148 U. S. 615, 622.

We do not think that the contract can be regarded as an evasion of § 5 of the Employers' Liability Act, which provides "that any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: . . ."

Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct

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and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences.

Thus being of opinion that Turner was not an employee of the company but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce.

*Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.*

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